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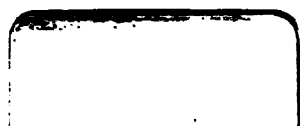
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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
FROM
MICHAELMAS TERM, 56 GEO. III.
TO
EASTER TERM, 56 GEO. III.
BOTH INCLUSIVE.
VOL. II.

By GEORGE PRICE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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A.

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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

MICHAELMAS TERM,—56 GEO. III.

— v. —

1815.

*Monday,
6th November.*

AN affidavit by two persons, in the jurat of which it was expressed to have been sworn, “ by both the “ deponents,” was tendered to the Court this day, in support of a special motion, and received.

It is sufficient that affidavits appear expressly by the jurat to have been sworn by all the deponents: and it is not necessary that they should be severally named in the jurat as having been sworn, as in the King’s Bench.

Dauncey, on putting in the affidavit, apprised the Court of the peculiar form of the jurat, which, he said, he felt himself called on to do in consequence of their recent intimation on that point (*a*); but submitted that, in this Court, if an affidavit clearly appear to have been sworn by all the deponents, as in the present case, such a caption should be deemed sufficient, there being no existing rule requiring

(*a*) *Rex v. The Sheriff of London*, ante, Vol. I. p. 338.

1815.

that each of the deponents should be mentioned by name in the jurat as having been sworn to its contents; and to that the Court assented.

Tuesday,
7th November.

WESTON v. FAULKENER.

Service of all processes intended to bring a party into contempt, should be personal if possible: but if it can be made appear to the Court that service cannot be effected personally, and that there was probable cause to suspect, that the party kept out of the way for the purpose of avoiding such personal service, the Court will grant a rule nisi for an attachment, and order that service, by leaving the rule at the dwelling-house, shall be efficient.

OWEN moving for an attachment against a party for not obeying an order of the Court, stated, from an affidavit, that it not having been found practicable to effect personal service of the order, it had been left at the dwelling-house of the person against whom it had been drawn up; that the mode of leaving it there was by throwing it in at the window, there being no person in the house to whom it could be delivered; and that it was believed that such absence had been the effect of a design to avoid the service of such order.

The Court (*having premised that service of all processes throughout, having for their object to bring a party into contempt, should be personal, unless specially ordered that it might be otherwise*), directed a rule to be moved for, calling on the person who was the object of it, to show cause why what had been done in the present instance should not be deemed good service, and intimated, that it might be part of the order to be made on the present application (if no cause should be shown against it), that service of such order at the dwelling-house, should be considered sufficient to ground the application for an attachment.

ATTORNEY

1815.

ATTORNEY GENERAL v. WOODHEAD.

Wednesday,
8th November.

A VERDICT had been found for the Crown, at the last Revenue Sittings, on an information against the defendant, under the 21st Geo. III. ch. 55, for receiving spirituous liquors from a person not having painted over the outward door of his place of business, the words Distiller, Rectifier, or Compounder of spirituous liquors, in compliance with the provision in the 19th Geo. III.

The Court will not, after verdict, arrest a judgment, on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial.

Pell, Serjeant, now moved for a new trial, on an affidavit, which charged the material witness on the part of the Crown with having falsely deposed at the trial, that there was a hole in the wall of the defendant's premises, through which the spirits had been conveyed, whereas (as it was now sworn in the affidavit) that there was not, nor could there have been, any such hole. It further stated, that an indictment had since been preferred against the witness for perjury, charged to have been committed on that occasion, at the sessions; and that the Grand Jury had found the bill.

Nor does it seem that a conviction would be sufficient ground for sending a cause back to a jury for re-investigation.

But the Court holding that on that affidavit there was not sufficient ground,

It was moved that the judgment might be arrested till the event of the trial should be known.

THOMSON, *Chief Baron*. The Court cannot blend a criminal and civil proceeding, for the purpose

1815.

ATTORNEY
GENERAL
v.

WOODHEAD.

of contradicting a fact sworn to on a trial. It would be pregnant with the greatest mischief if even a conviction of perjury, on evidence given by a witness, were to be received in answer to a verdict. His Lordship adverted to the case of *Bartlett v. Pickersgill* (b), where the plaintiff petitioned for leave to file a supplemental bill, in nature of a bill of review, the defendant having been convicted of perjury in the main subject of his answer; but *Lord Keeper HENLEY* dismissed the petition.

Rule refused.

— v. —

Same Day.

Service of an
order of Court
on a servant
of the party,
not at his
dwelling-
house, insuffi-
cient.

DAUNCEY moved to make absolute, a rule for an attachment against, on an affidavit of service of the rule on a servant of the party.

Per Curiam.—There is no case of service on a servant being held good, unless it be at the dwelling-house, where all proceedings not required to be personally served, should be left.

Motion refused.

Friday,
10th November.

HALL v. FRANKLIN.

Service of *vi-
vire facias* at
dwelling-
house, on de-
fendant's
wife, good.

OWEN moved for a *distringas*, for non-appearance to a writ of *venire facias*, on affidavit of service on the wife of defendant, at his dwelling-house.

Motion granted.

(b) *Cox's Cases in Equity*, p. 16.

REX

1815.

Saturday,
11th November.

REX v. BOYLE.

DAUNCEY moved that this case, which had been argued and disposed of at the sittings after last *Trinity* Term (*a*), in the absence of the Solicitor General, might be permitted to be brought before the Court for a second argument, that the Solicitor General might have an opportunity of being heard; which the Court considering to be irregular and impracticable,

The Court will not appoint a re-argument after a decision, in the absence of the Crown officer, to give him an opportunity of being heard.

Refused.

WATTLEWORTH v. W. H. PITCHER.

Same Day.

PARKER moved that *A. E. Pitcher*, the defendant's attorney in an action commenced at law, might be ordered to accept a subpoena in this cause, on the part of the defendant, he having refused to do so on application, and that serving it on him might be deemed good service. The plaintiff had filed a bill for an injunction to restrain the defendant from proceeding further at law, in the action brought by him to recover a sum of money, and for an account. The affidavit in support of the motion stated, that the defendant, who resided at Martinique, having authorized his said attorney to bring the action now sought to be restrained, the plaintiff had—in consequence, been held to bail, on an affidavit of debt made by the defendant's said attorney, and that mutual accounts subsisted between the parties.

The Court will order the solicitor of a plaintiff residing abroad, who has been employed to commence an action at law, to accept a subpoena on an injunction bill, supported by an affidavit of the facts, and of the subsistence of an account between the parties.

Motion ordered.

(*a*) Vide ante, vol. I. 436,

1815.

Same Day.

Interlocutory judgment may be signed on the last day of the time given by the rule to plead, if no plea then filed.

EDMONDS v. LEMAN.

WILLIAMS, J. moved to set aside the interlocutory judgment which had been signed in this cause for irregularity. The writ was returnable on the first general return day of the present term. The rule to plead, which is said to be a four-day rule, inclusive, expired on Thursday the 9th, and the plaintiff signed the judgment on the 10th, which was now sought to be set aside, on the ground that the defendant had all the 10th to plead in, and that judgment ought not to have been signed till the 11th. It was contended, that by the practice of the Court of King's Bench, judgment could not be signed till the day after the last day of the time for pleading, although it was admitted that, in the Common Pleas, according to the case of *Laing v. Bumsted(a)*, the practice was to compute the time to plead inclusively, as had been done in the present case; but the question now raised was, whether the plaintiff had done right, and was entitled by the practice of this Court, to sign judgment, for want of a plea on the 10th.

[The Master being referred to, reported, that according to the usage of this Court, what had been done was correct. The defendant should have pleaded by the 10th, or the plaintiff might sign judgment on that day.]

Per Curiam.

Motion refused.

(a) 2 Bl. 1243.

It

It was suggested, that the defendant had a good defence to the action.

1815.
EDMONDS
v.
LEMAN.

Chief Baron. If you come to set aside a regular interlocutory judgment, on the ground of having a good defence, you must make another application, supported by an affidavit of merits.

IN THE EXCHEQUER CHAMBER.

In Error.

—v.—

Monday,
13th November.

KNOWLES, Common Serjeant, moved, that interest might be computed and allowed on the affirmance of this judgment.

It is sufficient, on a motion for interest on affirmance of a judgment, to apprise the Court of the cause of action, *ore tenus*: an affidavit is not indispensable.

To a question from the Court, he answered, that he was not furnished with the usual affidavit, as to the cause of action, but that he was instructed that it was on a bill of exchange.

GIBBS, *Chief Justice*. It is not absolutely necessary that an affidavit should be made of the cause of action; it is sufficient if the Court be informed of the fact by counsel.

1815.

Wednesday
15th November

WILLIAMS v. DETHICK.

A person occupying a house for a limited period, for which he pays neither rent nor taxes, admissible to justify as special bail.

JONES, D. F. opposed the justification of one of the defendant's bail, on the ground that he was not a housekeeper, in the sense in which that description was meant to be understood, as applicable to sufficiency of bail.

He was employed by the Commissioners in the repair of the water-works in Swallow-street, and they allowed him a house to live in during the period of his employment, for which he paid no rent or taxes.

The COURT held, that he was such a housekeeper as might become bail; and he was allowed to justify.

Same Day.

BRANKER v. MASSEY.

On motion to set aside proceedings as *infra dignitatem*, on an affidavit that the demand sued for does not amount to 40s. the Court will not inquire into the amount, if an affidavit be put in shewing cause, that the demand exceeded that sum, but will at once discharge the rule, with costs.

CAUSE was shewn against a rule why these proceedings should not be set aside, as beneath the dignity of the Court, which had been granted on an affidavit, that the debt (if any) was under 40s.; when it was stated by an affidavit on the part of the plaintiff, that the debt amounted to more than 40s. the Court discharged the rule, with costs.

M'NABE

1815.

M^cNABB and others v. INGHAM and another.Friday,
17th November

LITTLEDALE moved for a *distringas* against the defendants, for not having appeared to a *venire facias ad resp.* on an affidavit, stating that the deponent had served the defendants with copies of the original, which was returnable on the 11th instant, by delivering them to a person at the counting-house of defendants, at Liverpool, who informed the deponent that he was their clerk; that he had used all means to serve them [in person] by attending at their office on the 9th, 10th, and 11th, without meeting them, that he was told by the Clerk that they were both from home, and could not be seen; and that one of them was in Liverpool, but where he could not tell.

Service of *venire facias ad resp.* by leaving it with a clerk of the defendants at their count in-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service.

Per Curiam.—It would be going beyond the rule, to grant a *distringas* on such a service.

Motion refused.

WICKHAM, v. MEALING.

Saturday,
18th November.

GASELEE had obtained a rule on the 7th, calling on the plaintiff to show cause, why the writ of *quo minus*, which had been served on the defendant, and

If the day on which a defendant is called on to appear, be omitted in the

notice attached to meane process, the Court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has suffered a whole term to elapse without giving notice to the plaintiff, and does not apply to the Court till after the execution of a writ of inquiry.

all

1815-
WICKHAM
v.
MEALING.

all subsequent proceedings, should not be set aside for irregularity. The affidavit of the defendant and his attorney stated, that defendant had been served with the annexed copy of a writ of *quo minus* on the 23d *May*, and that he had not been served with any other copy; that the writ was issued on the 19th *May*, and that it had no notice subscribed, specifying the time when the defendant was to appear at the return thereof*, and that he was informed by his attorney, that he had good ground of defence to the action; that on the 14th of *June*, notice of the omission was given to the plaintiff's clerk in Court; and that, notwithstanding such notice, the plaintiff had proceeded in the action, and executed a writ of inquiry of damages. The clerk of the defendant's agent also made an affidavit, that he had called on the plaintiff's clerk in Court, on the 15th day of *June*, after the defendant had been served with notice of declaration, and had informed one of his clerks of the defect; and that in case of plaintiff's proceeding further, the Court would be moved to set aside the proceedings.

Dauncey showed cause; submitting, that if the omission in the notice under the writ, of the day of appearance, were irregular, yet, where in the body of the process the day was distinctly stated, as here, (for the writ calls on the defendant to appear in fifteen days of the Holy Trinity), it should hardly be held to be a fatal omission; for the defect in this case

* The blank for the day of appearance, in the notice underneath the usual printed form of copy of process for service, which should have been the 4th of June, had been neglected to be filled up.

1815.
WICKHAM
v.
MEALING.

is, that the appearance day is not mentioned at all in the notice, not that a day is mentioned repugnant to that in the body of the writ. But even if it were, there had been such gross and reprehensible delay, in defendant not applying to set aside the process for that irregularity before, as the Court would not encourage by entertaining the motion. The defendant was served on the 23d of *May*; that (*Easter*) term did not end till the 26th; the writ was returnable on the first return in the following term; yet, during the whole of that term no notice was taken of the defect, and not till the 15th, the day after the term was over, was any intimation made of it, and then a verbal message only is given to one of the clerks of the plaintiff's agent. It is laid down in the books to be the practice, and it is founded on principle, that wherever a defendant would take advantage of an irregularity in mesne process, he must proceed to do so before appearance, whether by his own attorney, or by plaintiff's according to the statute(*b*), or all objection is waved(*c*). In this case, the plaintiff has not only signed judgment, but has executed a writ of inquiry.

The COURT held, that the words of the statute could not be got over; and therefore, notwithstanding the delay, and the stage of the proceedings, made the

Rule absolute, with costs.

(*b*) The plaintiff in this case had entered an appearance.
Sec. Statutum.

(*c*) Tidd's Practice, p. 162—516.

CAULIN,

1815.

Tuesday,
21st November.

CAULIN v. Sir ROBERT LAWLEY, Bart.

Service of
venire on de-
fendant's ser-
vant, at his
dwelling-
house, during
his absence
abroad, not
sufficient, nor
will the Court
grant a rule
to shew cause
why such ser-
vice should
not be suffi-
cient.

OWEN moved for a *distringas*, for not appearing to *venire*. The affidavit stated the service to have been on a servant of defendant, at his dwelling-house, after having called there three times without seeing him, when defendant was told by the servant that the defendant had been gone abroad six months, and was not expected to return for two years.

THOMSON, Chief Baron. (*After referring to the officer, who reported that it was not effectual service*). The question is, whether, where a man is abroad, and remains out of the kingdom for two years, he can be so served with this process. The officer thinks with me, that it is not good service, for the purpose of founding a *distringas*, unless it can be shown, that the defendant has gone abroad for the purpose of avoiding the service.

Owen then applied for a rule to show cause, why the service at the dwelling-house should not be deemed good service; which the Court

Refused.

The

1815.

The KING, in aid of EVERETT & Co. v. MOWBRAY
and others.

Wednesday,
22d November.

SCARLET moved for a rule to shew cause, why this extent should not be set aside for irregularity. It had been issued against the defendants, who were bankers at Durham, in aid of *Everett* and Company, bankers in London, founded on an extent against *Everett* and Company. *Everett* himself was receiver-general for the county of Middlesex, and had paid the money officially received by him into his own bank, to the account of himself and partners. The extent had been issued in the usual manner, and the *fiat* was granted on the common affidavit in vacation, by the chancellor of the exchequer, and signed by him.

The rule of Court, of 15th Car. I. that no debts, without specialty, shall be found by inquisition for debts in aid, unless it be by order on motion in open Court, or unless it be for debts due to the King's farmers, not to be limited to a confined construction of persons answering the description of King's farmers, but is to be considered as extending to all persons becoming accountable to the Crown for money belonging to the public in their hands.

The first objection made was founded on the rule made in this Court in the 15th of Charles I. that "no debt, without specialty, shall be found by inquisition for debts in aid, unless it be by order or motion in open Court, and unless it be for debts due to the King's farmers;" and it was contended that, admitting *Everett* himself, in character of receiver-general, were entitled to be considered as the King's farmer, so as to give him a right, yet, that having paid the money into his bank, the debt was no longer due from him as receiver general, but from him and his partners, merely as accountable

The rule of the 3d of William III. that *fiats* shall not be granted on a simple contract debt

in vacation, unless by order of a Baron, held not to be intended to infringe the authority of the Chancellor of the Exchequer to sign such *fiats*.

to

1815. to the Crown for having become possessed of the Crown's money.

The KING, in aid of EVERETT & Co. [GRAHAM, *Baron*. Still *Everett* would be entitled, for the debt of one partner is the debt of all.]

v. MOWBRAY and others.

Then the question arises, whether the receiver-general is, as such, the King's farmer?

[THOMSON, *Chief Baron*. There can be no doubt of that.]

In that case the extent should have issued on behalf of *Everett* and Company, *qua* farmers of the King. This is a mere simple contract debt, and not in any manner founded on specialty.

THOMSON, *Chief Baron*. This was originally a debt due to the Crown from *Everett* alone, as the King's receiver or farmer. But whatever his description may be, there have been some thousands of instances in this Court since that rule of the 15th Charles I. down to the present time, wherein that rule has not been adhered to. Then he, as the person originally solely liable, pays the money into the hands of himself and partners, which makes them all accountable to the Crown for that money, as having received it with knowledge that it was public money. The debt being accordingly found, by inquisition, to be due from all, another inquisition finds the debt due to them, from *Mowbray* and Company, their debtors, upon which the extent issued; and issued, as appears to me, quite in the common course of the business of this Court, established,

established by an usage too ancient to be disturbed.

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That rule is, therefore, so far obsolete, at least as you construe it. The King's farmer means the King's accountant; and there never was a motion, that I am aware of, made in open Court for an extent in such a case, merely on the ground, that it was necessary so to make it, because the debt due to the Crown was a simple contract debt.

[GRAHAM, *Baron*. By the intervention of the inquisition, a simple contract debt is made a debt of record.]

Another objection was then made, founded on the rule of 1691, which orders, that no extent in aid shall issue for a simple contract debt in vacation, unless it be by order of a Baron of the Court. In the present instance, the *fiat* having been granted in vacation, and signed, not by one of the four Barons, but by the Chancellor of the Exchequer, it was urged, therefore, to be irregular, inasmuch as it was contrary to that rule of Court.

[GRAHAM, *Baron*. That rule cannot be construed to take from the Chancellor of the Exchequer his inherent power of granting *fiats*. He is at the head of the Court, and is, as such, constantly in the habit of signing *fiats*, particularly when the Barons are absent from town.]

It was admitted, that the practice of the Court was against the objection; but it was suggested,
that

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that as the Chancellor of the Exchequer was nowhere called a Baron in the books, and as the rule was express, the practice being against the rule, could not be regular. It was also mentioned, as merely matter of opinion on the part of a high professional character, that the late Chancellor of the Exchequer had himself refused to sign such *fiats*, from a doubt entertained by him of his having authority to do so.

Sed per Curiam.—There can be no doubt on that question. The objections are altogether void of foundation, and the present extent appears to be quite in course.

Rule refused.

Same Day.

ELLISON v. COATH.

This Court will order a plaintiff showing cause against a rule for judgment, as in case of a nonsuit, for not proceeding to trial according to notice, to pay the defendant costs, give a peremptory undertaking, and (if the *venue* has been changed to a county where no assizes are held in the spring) consent that the *venue* shall be brought back to the original county, that the trial may be brought on without further delay.

OWEN showed cause against a rule which had been obtained for judgment, as in case of a nonsuit, for not proceeding to trial according to notice. He put in an affidavit of the absence of a material witness, submitting, that, according to the practice of the other Courts, any reasonable excuse disclosed on an affidavit, accompanied by a peremptory undertaking, and (in this Court) payment of costs, would be held good cause against making this sort of rule absolute. On the part of the defendant, it was pressed, that the plaintiff should not be allowed to get rid of the present rule, as he had harassed the defendant

defendant with great delay, by changing the *venue* from Cornwall to Bristol.

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The Court, however, discharged the rule; but they imposed on the plaintiff, the terms of a peremptory undertaking, on his part,—to proceed to trial at the next assizes for the county of Cornwall;—and that he should, for that purpose, consent that the *venue* should be brought back from Bristol (where it was now laid, there being no assizes held there in the spring) to Cornwall; the change of *venue* to be incorporated in the present order,—and that he should pay the costs of the defendant.

Rule discharged.

The KING v. DE CAUX.

17th Nov 278
ABBOTT, on the behalf of the defendant's landlord, moved, that the sheriff of the county of Norfolk might be ordered, (out of the proceeds of the sale of the goods, chattels, and effects of the defendant, which had been seized under this extent *in aid* on the premises of the applicant, in the occupation of the defendant, as his tenant), to pay to him the sum of 204*l.* 10*s.* being one year's rent due for the farm and premises on which the property of the defendant had been so taken, and which rent was due to the applicant before the time of the *teste* and suing forth of the said extent:—and that the said sheriff, after payment of the said rent, and the debt and

Friday,
 24th November

The landlord of premises on which goods have been seized under an extent *in aid*, is not entitled, under the 8th Anne, to call on the sheriff to pay twelve months rent, due before the *teste* of the writ.

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damages to be levied by the said extent, might be further ordered to pay, out of the surplus monies arising from the said levy, the amount of such further rent as should be found to be due to the said landlord.

The motion was founded on the 8th of *Anne*, ch. 14, s. 1, which provides, that no goods or chattels, lying or being on any premises leased, &c. shall be liable to be taken by virtue of any execution, "unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the premises, by virtue of such execution or extent," pay to the landlord of the said premises one year's rent. And the question was, whether the proviso in the act, that it should not be construed to the prejudice of the Crown, precludes the landlord in the case of extents *in aid*. It was submitted, that in the case of the *King v. Cotton (a)*, *Chapman* was a bond debtor to the Crown, and the extent was immediate, which distinguished that from the one now before the Court;

But they held, that an extent, although issued in aid of a subject, was a prerogative process, and ultimately, and in effect operating for the benefit of the Crown, and that the Act did not affect levies under that process. As to the word *extent*, used in the clause, that might be satisfied by applying it to such as were of a private nature, of which there are several, as extents on statute staple, and others.

Motion refused.

(a) Parker, 112.

COOK

1815.

COOK v. JOHNSON.

THE plaintiff, on the trial of this cause at Guildhall, having recovered less than 5*l.* *Barnewall* obtained an order, that the plaintiff should show cause, why the defendant should not be at liberty to enter a suggestion on the roll, under the London court of conscience act, on an affidavit that not more than 3*l.* 10*s.* the sum recovered, was due at the time of the commencement of the suit.

Saturday,
25th November.

If the plaintiff recover less than 5*l.* in an action brought in London, where the original debt has been reduced by payments and not by set-off, the defendant will be permitted, on motion, to enter a suggestion on the roll, under the London court of conscience act, in order to have his costs allowed.

Clarke, N. R. now showed cause. He stated, that the action had been brought for the balance of an account for wages, amounting originally to upwards of 30*l.* and that plaintiff had only received 10*l.* 5*s.* which was verified by an affidavit of the plaintiff; and submitted, that this being an action for the balance of an account, reduced by subsequent payments, but still for a demand of more than 5*l.* was not within the Act; and he cited the case of *Mc Collam v. Carr (a)*, where *Eyre, C. J.* said, "Is there any case where the ultimate balance of an account only being under 40*s.* the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant, might by such means come to be decided before a county court. It seems to me, that the original demand ought to be under 40*s.*"

But the COURT, distinguishing between cases

(a) 1 B. P. 223.

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COOK

v.

JOHNSON.

where the original debt was reduced by payments and where there was a set-off, were of opinion, that the sum actually recovered by the verdict was the criterion by which they were to be guided; and made the

Rule absolute.

Wednesday,
22d November.

SCOTT v. ALLSOPP and others, Executors, &c.

15th Nov 1816

Bond for securing money already advanced, and to be in future advanced, in account current, (although the obligation be under a penalty in a sum certain, however less than 20,000*l.*), cannot be received in evidence, unless it bear a 20*l.* stamp: being held, notwithstanding the penalty, to be a bond for the security money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, is uncertain and without limit, in the words of the 48 *Geo.* III. ch. 149. Those words are to be construed as applying to the effect of the condition of the bond, without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security, where such bond is given to secure the payment of a final balance on account current.

THE plaintiff had been nonsuited on the trial of this cause, at the Summer Assizes at Hereford, by the direction of Mr. *Baron Wood*. It was an action of debt, on a bond from the defendant's, testator and others, in a penalty of 4,950*l.* The condition (reciting that the obligors, who were bankers, had frequent occasion to borrow money of the plaintiff, and to negotiate bills belonging to or received from him), was, that if they or either of them should pay the plaintiff "all and every such sum or sums of money as *they now stand indebted to the said J. B. Scott, or which they shall or may hereafter owe or stand indebted, in account current, to the said J. B. Scott, his executors, administrators, or assigns, Then,*" &c.

The defendant pleaded the general issue and

plene

plene administravit præter, 2,000*l.* Replication joined issue, and prayed judgment as to the said 2,000*l.* Breaches suggested (under the statute), that defendant's testator, at the time of the execution of the bond, was indebted, *cum aliis*, to the plaintiff in 850*l.* account current; and that, after making the said bond, the testator, in his life-time, stood indebted to the plaintiff, in account current, 13,000*l.* Yet, &c.

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v.
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and others,
Executors,
&c.

The objection on which the nonsuit had been directed by the learned judge, was, that the bond being ingrossed on a 7*l.* stamp, had not been duly stamped, according to the statute of the 48th Geo. III. ch. 149, schedule, part 1, and was not therefore a valid security, or capable of sustaining the present action. By that statute, there is imposed on "Bond in England, and personal bond in " Scotland, given as a security for the repayment " of any sum or sums of money *to be thereafter* " *lent, advanced, or paid, or which may become* " *due upon an account current, together with any* " *sum already advanced, or due, or without, as the* " case may be, where the total amount of the " money secured, or to be ultimately recoverable " thereupon, shall be uncertain and without any " limit, 20*l.* And where the money secured, or " to be ultimately recoverable thereupon, shall be " limited not to exceed a given sum, the same " duty as on a bond for such limited sum."

Jervis obtained a rule to show cause, why the nonsuit should not be set aside, and a new trial granted; 6th November.

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granted; having contended, that all the cases had now fully established, (whatever may once have been the doctrine,) that on a bond in a sum penal, nothing beyond the amount of the penalty can be recovered at law; and that, if that were so, the present bond did not come within the description in the act, of 'bonds whereon the sum ultimately recoverable should be uncertain and without limit;' but that it was rather of the class of those wherein the sum ultimately recoverable was limited not to exceed a given extent, such limit having been fixed by the amount of the penalty of the bond, beyond which, the obligor is not legally liable. The first case which occurs, is that of *Brangwin v. Perrot (a)*, where, in an action for a single breach of a bond, the defendant was permitted to pay the whole penalty into Court, with costs. The next is the case of *White v. Sealy (b)*. There it was held, that on a bond, conditioned for the payment of a yearly rent by a third person, the defendants were not, as sureties, liable for more than the whole penalty. In a subsequent case, indeed, of Lord *Lonsdale v. Church*, it was ruled that a plaintiff might recover beyond the extent of the penalty, in the shape of interest and damages, for the detention of the debt; but that case was soon overruled, first by that of *Collins v. Collins (c)*, though the question was only collaterally met there. The last case on the point is that of *Wilde v. Clarkson (d)*, expressly overruling that of Lord *Lonsdale v. Church*, and establishing the doctrine, that the

(a) 2 Bl. 1190.

(b) 1 Doug. 49.

(c) 2 Bur. 820.

(d) 6 T. R. 304.

obligor

obligor is not liable beyond the amount of the penalty.

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Dauncey and *Campbell* now opposed the rule. They admitted that the plaintiff could not, on a bond, recover more by action than the amount of the penalty; but contended, that notwithstanding that was the rule of law, it afforded the plaintiff no argument to satisfy the Court that this bond was not liable to the largest duty: for it is a bond standing, and operating, in effect, as a security for a much larger sum than the amount of the penalty, and in course of time, may actually be the means of having secured to the plaintiff the repayment of money to an indefinite amount, although, when it comes to be put in suit and proceeded on; no more than the penalty may possibly be recoverable, and perhaps still less may be in fact recovered. It comes, therefore, fully and completely within the statute.

If, indeed, this bond does not come within the words and meaning of the act, there can hardly be such an instrument as an unlimited bond devised, on which the statute would operate, and some such case as the present was precisely that for which the act meant to provide. This is, in truth, a floating security for the balance of an account current, and the sums advanced on the faith of it might exceed, and in this case really had infinitely exceeded, the amount of the penalty expressed in it; and it was for that reason that the nonsuit had been directed at the trial. Suppose the amount of the penalty had been advanced and repaid twenty times over,

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this bond having already operated so as to secure such advances, would still have stood as a security for the whole penal sum, and the last advance made on it, would have been as effectually recoverable under it, as the first.

The clause, providing that,—where there shall be a limitation that the bond shall not stand as a security for more than a given sum, there shall be a given duty imposed,—must be taken to be applicable to such bonds only as shall contain an express stipulation, that the obligors shall not be liable on it beyond a certain amount; and that, as soon as that amount shall have been repaid, the bond shall be rendered, *ipso facto*, void. Such was the bond given in the case of *Kirby v. The Duke of Marlborough (e)*. There are three classes of bonds contemplated by the act, within one of which this must come, as it is not to be supposed that any exemption was intended. They are 1st, Bonds for a sum certain; 2dly, for securing an indefinite balance on an account current; and, 3dly, for securing a balance on such an account within a certain limit. Now the Defendants contend, that the bond which is the subject of the present question, is of the second class, and ought, as such, to have borne a 20*l.* stamp to be admissible in a Court of law: and that nothing but an express provision introduced into the condition, that it should not operate as an available security for more than a certain sum of money, can transfer such Bonds from the second class to the third.

(e) 2 Maule and Selwyn, 18.

Jervis, Abbot, and Puller, supported the rule. They observed, that the question, as now put, was really merely whether it be absolutely necessary,—to bring bonds for uncertain sums within the third class of bonds enumerated in the Act,—that the limitation should be expressly introduced in the condition of the bond, and be found there only; or whether, as the Plaintiffs contend, (which seems to be denied on the other side), it be sufficient for that purpose, that there be a limitation in the amount of the sum ultimately recoverable on the bond, contained in any part of the instrument, either expressly or virtually; and that such limitation may be adopted, as well in the obligatory part of the bond as in the condition; and that it would even be sufficient, if it can be collected from the general tenor of the bond, that the parties had intended any such limitation.

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It is admitted, that nothing beyond the penalty could be recovered on this bond, either at law or in equity; now the Plaintiffs proposition is, that the term "*recoverable*," as used in the Act of Parliament, was obviously intended to imply, recoverable by suit. If (as is contended) this Bond must be construed to be one which, (inasmuch as it might possibly *ultimately* secure a much larger sum than the whole amount of the penalty,) is therefore to be considered as a bond given to secure an indefinite sum, the same reasoning would apply to such a bond, even though it should contain an *express limitation in the condition*, of the amount which it was meant to secure; and therefore, even then it must still have been deemed an unlimited bond: yet they admit, that such a bond would come within their

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the third class of bonds, for securing an uncertain sum, but limited as to the utmost extent of that sum. The true criterion of ascertaining to which description of bonds this really belongs, is, by inquiring for what sum the surety, as distinguished from the principal, would be liable in an action at law. In this case, that would be the amount of the penalty, and no more, and therefore the penalty operates, in effect, as a limitation; and it will then make no difference whether the bond be given to secure a primary gross sum, or the aggregate of various sums to be advanced at different periods on an account current.

It is said, that no Bond could be devised but such as the present, to satisfy the second description of Bonds in the statute. This might have been a Bond without express penalty, a single Bond, generally for all such sums as might be from time to time advanced; and such a Bond, though it would operate as a covenant, was most probably the exact kind of instrument in the contemplation of the legislature, as it would be, truly and unequivocally, a Bond for securing an indefinite sum of money. There are also certain covenants in use, with a penal clause at the end. A covenantee electing to proceed on the penal clause, could recover no more than the amount of the penalty.

[GRAHAM, *Baron*. If money had been previously paid on the Bond by the surety, or recovered from him, would it not still stand as a security for the whole penalty?]

The

The form of the judgment, in such a case, would be, for the penalty, with 1 s. damages for the detention of the debt, and execution would issue for the sum due, and costs; but the plaintiff would not be entitled to levy more than the penalty. Nor on *scire facias*, for a larger sum due, could more be recoverable than the amount of the penalty. And it would be the same thing, if a clause of limitation were introduced in the condition.

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As it is not only necessary to bring a Bond, within the description within which this is contended to be, to show that the sum intended to be secured is uncertain and without limit; but that the sum ultimately recoverable thereon is so too;—and as by law nothing beyond the amount of the penalty can be recovered;—wherever, therefore, there is a certain penalty in the obligatory part of a Bond, as in this, it is not an unlimited Bond, but for a final sum certain, and therefore not liable to a higher duty than that imposed on Bonds for such sum.

THOMSON, *Chief Baron*. This point depends entirely on the true construction to be put on this Act of Parliament, as to the several kinds of Bond in the contemplation of the Legislature, when it imposed these various duties on Bonds of different descriptions; but of whatever description such bonds may be, the duties must be taken to be payable with reference to the time of the execution, without regard to future periods.

The question before the Court is, what sum was payable for the duty on this particular Bond at that time?

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time? This statute contemplates, in the first place, Bonds intended as securities for definite and certain sums; and proceeds, by a scale, to assess the duties payable on those sums being so secured, beginning with the small sum of one pound, and progressively rising to 20,000*l.*; and, as I read the act, it has in view the sums payable by the condition of the Bond, without adverting to the amount of the penalty. The next description of Bond, and that which is made liable to the largest duty, is that which shall be given to secure the repayment of money advanced, and to be advanced, upon an account current, where the total amount of the money so secured thereby, or to be ultimately recoverable thereupon, shall be uncertain and without limit. Then the third class comprehends those wherein it is expressed that the money to be secured thereby, or to be ultimately recoverable thereon, shall be limited not to exceed a given sum: then the same rate of duty is imposed on such Bond as if it had been made to secure such given sum: the statute always applying to the money intended to be secured by the condition of the Bond at the time of its execution.

On the part of the plaintiff it has been contended, that as no more than the penalty of this bond is at any time recoverable at law, that operates as a limitation of the amount of the security, and makes it a Bond securing an indefinite sum, but a sum still within the extent of the penalty. Now I cannot but consider the words in the Act, where the money secured, or to be ultimately recoverable, "shall be limited not to exceed a given sum," as contemplating

plating an express limitation, to be provided by the condition of the bond.

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Then, inasmuch as the present Bond was made to secure the repayment of certain money, already advanced at the time of the execution, as well as all such further sums as should be thereafter advanced by the obligors on an account current, I cannot but consider it to be a Bond, whereby the total amount of the money intended to be secured, or to be ultimately recoverable thereon, was, at the time of the execution, uncertain and without limit; and that, therefore, the amount of duty payable thereon, at that time, was 20*l*.

In another part of the Act, Bonds given as security for the transfer of shares in the public funds, (which are generally given in a penalty), are made liable to a duty proportioned to the value of the stock secured to be transferred, which is to be computed according to the average price of such stock at the time of the execution of the bond. There, there is not the least reference to the penalty of such bonds, and the duty which attaches is payable on the money advanced, with reference to the object of the condition of the bond.

It seems to me, therefore, that in this case, the penalty is out of the question; and measuring the duty payable at the time of the execution of the bond, by the terms and object of the condition, the bond given in this instance required a 20*l*. stamp, and for want of it, could not be used in support of this action. I think

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think my Brother Wood was right in directing a nonsuit, and that it ought to stand.

GRAHAM, *Baron*. The Act looks to the general nature of the security, and has no reference to the penalty. Nothing is more frequent than persons, becoming security for others in an uncertain sum, guarding themselves by limiting their engagement to an express amount, and providing (if the instrument be a bond) by the condition, that as soon as so much money shall have been paid, their liability shall cease. In that case, the duty imposed by this Act on such bonds, would be measured by the amount of the limitation; but where there is no such limitation so expressed, the sum secured is uncertain and without limit, and the instrument of security is subject to the highest duty. Now I take this to be exactly such a case, and therefore, that this bond is precisely that which was meant by the Act to be made liable to the largest duty. If, as soon as 1,000*l.* had become due, the plaintiff had sued on the bond, and had been paid, although he could not have ultimately recovered at law more than the penalty, yet if, on the commencement of each frequent suit, he had, *toties quoties*, received so much, the bond would have, in the end, secured to him a much larger sum than the amount of the penalty; and therefore I think that this bond should have borne the stamp to be imposed on such as are liable to the highest duty of 20*l.*

WOOD, *Baron*. On the best re-consideration that I have been able to give this case, it appears to me,
that

that the duty on these bonds was meant to be measured by the sum intended to be secured by the condition of the bond. All Bonds, whatever may be the penalty, are intended to secure the sum expressed in the condition, and according to the condition; and had the Legislature meant to have imposed the duty on the penalty, it would have been, in most cases, imposed on double the sum actually advanced, and intended to be secured.

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(Having read the words of the Act.) The bond in question was given to secure the balance of an account current after payment, by the principal, of the money advanced at the time of its execution, and of all sums thereafter to be advanced, without limit as to the ultimate or total amount.

I am therefore of opinion, that the condition of this bond, containing no restriction as to the total amount of the money for which it was intended to stand as a security, brings it within the description of bonds made liable by the Act to the duty of 20*l*. The money secured by it is uncertain and without limit, notwithstanding the penalty be fixed; for that does not restrain the obligee from recovering, ultimately, on the condition, as much more than the penalty, as the amount of all the sums which may have been in the mean time advanced on the faith of the bond, and repaid; for the obligors might be called on as often as the money advanced amounted to a sum somewhat less than the penalty, to pay the obligees so much; and thus, in the end, the bond might have availed them as security for 20,000*l*. or a much greater sum; and it is therefore strictly the
kind

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kind of bond contemplated by the Legislature, as being intended to be subjected to the duty of 20 l.

It is said, that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but I should have doubted whether it would not then have been liable to that duty, if it had been given to secure a final balance on account current; but, at all events, in the present case, I am clearly of opinion that this bond is within the Act, and that therefore it could not be received in evidence, for want of a proper stamp.

RICHARDS, *Baron*, concurred; suggesting, that otherwise the revenue might be constantly defrauded, by having recourse to the evasion which this sort of bond, if available, would furnish.

Rule discharged.

Friday,
24th November.

THOMAS v. MATTHIAS.

Where an order for a messenger has been issued against a sheriff for contempt, in not returning an attachment against a defendant for

not putting in his answer (other attachments having been issued before), it is peremptory: and the Court will not stay the order, although it go to affect a sheriff not in office at the time of the alleged original neglect: nor will they consent to enlarge the time allowed by the order.

The previous order to the High Sheriff, to return the process, may be served on his Under Sheriff, and such service will be good.

Nor will the Court enlarge the time limited by the order in such a case.

stayed

DAUNCEY moved, that the order made in this cause, for a messenger to bring up *Morris Williams*, Esq. High Sheriff for the county of Pembroke, to the bar of this Court, for contempt, in not returning an attachment with proclamations, which had been issued against the defendant, might be

stayed in the hands of the plaintiff for ten days, the said *Morris Williams* submitting to pay all costs, and undertaking to file a return within that time. It was urged, in favour of the application, that the neglect complained of (if there had been any) was the neglect of his predecessor in office : and it was objected, that the original rule, for the Sheriff to return the attachment within a week, had been served on the Under Sheriff.

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Stephens opposed it; stating, that very great delay had arisen to the plaintiff's suit (which was a bill filed against the defendant in 1812, for tithes), in consequence of the Under Sheriff not returning the several attachments which had been issued against the defendant for not putting in his answer; that now, at length, an attachment against the Sheriff had been executed by the Coroner, and he had entered into the usual bond, in the penalty of 40*l.* conditioned, for answering the contempt by the 21st June last; but that not being done, and the usual rule for the Coroner to bring in the body, having expired, the plaintiff had obtained the order in question, for a messenger against the Sheriff.

THOMSON, *Chief Baron*. The order does not require personal service; it is sufficient that it be served on the Under Sheriff. As to the application itself, he is in contempt, and therefore the Court will not interfere.

Motion refused, with costs.

Dauncey then applied to enlarge the time, which the Court also refused.

1815.

IZON & WHITEHURST v. BUTLER & another,
Executors, &c.

Monday.
27th November.

A bequest by the obligee to one of joint obligors, of a debt due on the bond, in these terms: "I remit and

forgive to T. W. the sum of 500*l.* which he stands indebted to me on his bond; and I direct said bond *to be delivered up to him and cancelled*," is merely a personal legacy to T. W., and lapses, by his death in the life-time of the testator: for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, and the representatives of the deceased legatee, are not discharged from the

payment of the money due on the bond.

THE question in this case arose on a bill, filed by *Izon*, who had been the partner in trade, and *Thomas Whitehurst*, who was the son and executor of *Thomas Whitehurst*, the deceased legatee, against the executors of *Catherine Abbott*, to compel them to give up a joint bond to be cancelled, which had been entered into by the partners, *Izon* and *Whitehurst*, to the Testatrix, and by her remitted by will, in the way of bequest, to the said *Thomas Whitehurst*, the elder, who had died in the life-time of the testatrix. *John Izon* and *Thomas Whitehurst* (the father of plaintiff, *Whitehurst*), who were in partnership as founders, at Birmingham, had, in the year 1777, borrowed of *Catherine Abbott* 500*l.* for which they gave this their joint bond.

In April 1805 *Catherine Abbott* made her will, which contained a bequest in these words: "I remit and forgive to Mr. *Thomas Whitehurst*, the elder," (the plaintiff *Whitehurst's* father) of Islington, the sum of 500*l.* which he stands indebted to me on his bond, and I direct said bond *to be delivered up to him and cancelled*." She died in September 1810, and her executors possessed themselves of her personal estate and effects, which were considerable. *Thomas Whitehurst*, the legatee, died in September 1807, having appointed his son *Thomas* (one of the plaintiffs) executor

executor of his will. The interest on the bond had been duly paid by *Izon* and *Whitehurst*, the obligors, during *Whitehurst's* life, and by *Izon* ever since his death, to *Catherine Abbott*, the testatrix, until her decease. Her personal effects, exclusively of the sum secured by said bond, was more than sufficient to pay her just debts, &c.

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Under the circumstances of these facts, as stated in the bill, and admitted in the answer, the plaintiffs claimed to be discharged from the obligation of the bond, although the legatee had died in the lifetime of the testatrix; submitting, that the bequest took effect as an equitable release. On the other hand, the defendants contended, that the bequest, notwithstanding the direction that the bond should be delivered up to be cancelled, had lapsed; and that therefore, they, as executors of the testatrix, were entitled to recover the money due on it from the plaintiffs.

Dauncey and *Roupell*, for the plaintiffs, urged, that this was the case of a *remission* and *forgiveness* of the debt, and not a bequest or legacy of the money secured by the bond; and that, therefore, although in the latter case it would have lapsed as a legacy; in the former, it took effect as an extinguishment of the obligation. The intention of the testatrix was, as is evident, that the debt should be extinguished; and, in equity, this bequest, being in the nature of a release, must, in its operation, extend to the co-obligor, a release to one, being established to be, in law, a release to all;

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and a court of equity, adopting a legal construction, will give it all its legal consequences. The case stands on the peculiar wording of the will: The Testatrix does not *give* and *bequeath* the sum or bond, but “*remits* and *forgives*” the debt; and she directs the bond “to be delivered up to him and cancelled,” not “*to be*” cancelled; all testifying an intention that the security should be destroyed: but the operative word is ‘*remit*,’ which releases the obligation. If so, the delivering up the security must follow of course, and that must be to the person interested in the cancelling it. The decisions are entirely in favour of this doctrine. The leading case on the point is that of *Sibthorp v. Moxom* (a), where the will was in these words: “I likewise *forgive* my son-in-law, “*Richard Chillingworth*, a debt of 500*l.* due to me “upon bond, and all interest that shall be due for “the same at my decease, and desire my executor “to deliver up the bond to be cancelled.” The legatee died in the life-time of the testatrix; yet that bequest was held to be a discharge of the debt. Now the bequest in that case is not so strong as in the present, except that her direction here, as to delivering up the bond to be cancelled, has the words “*to him*,” which, it will probably be contended, shows the bequest to have been personal; but to whom should the delivery be made? Certainly to the person to be benefited by it. There, the Chancellor said, that equity would give it the effect of a release at law against an executor. And he adds;

(a) 3 Atk. 580.

• If,

' If, in the case of *Elliott v. Davenport* (b), which
 ' had been cited, it had been said, I *forgive* my son
 ' such a debt, and the bond had been ordered to be de-
 ' livered up to be cancelled, it would have been held a
 ' discharge.' And afterwards his Lordship makes the
 distinction, where the words are penned as *forgive-*
ness or *remission*. Now here there are both words ;
 and all the cases subsequent to that of *Sibthorp* and
Moxom, are cases of mere bequest and gift, without
 words of remission. These are the operative words
 which create the distinction, and being given their
 effect, the delivery of the bond becomes nugatory ;
 and that objection affects the cases which otherwise
 would appear to incline against the construction
 for which the plaintiffs contend.

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Martin, and *Trower*, for the defendants, ad-
 verted to the circumstance of the interest having
 been paid up to the death of testatrix, and after
 the death of *Whitehurst*, as showing that the debt
 had not been extinguished during her life, and
 that she had not meant the remission to operate *eo*
instanti, as it must have done, if it operated as a re-
 lease ; and also, that *Whitehurst* alone had been the
 object of her bounty. Against creditors, such a
 constructive release would clearly not have been
 good, and the situation, in particular cases, of
 parties, cannot safely, and therefore never should be
 permitted, to control the effect and operation of
 wills ; the question here is, what would be the
 operation of such words as those used in this will
 in every case.

(b) 1 P. Wms. 83.

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In

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In the case cited of *Sibthorp* and *Moxom*, it is clear that Lord *Hardwicke* was struggling throughout, against a point of law, to give effect to a family arrangement with which it interfered, and that is a case of deviation from the rule of law, which should not be carried further. His words are, 'The testatrix had in contemplation some benefit to all the branches of her family. The daughter of *Richard Chillingworth's* wife is the person who now applies for this benefit, and it would be hard to say that, because the son-in-law died in the testatrix's life-time, the grand-daughter, who was of her blood, should lose it.' Now *Izon* was not in any way related to the testatrix, and can have no claim on that ground.

The case in this Court, of *Toplis v. Baker (c)*, but that it wants the word *forgive*, is wholly in favour of these defendants; and there is no decision cited in which the words remit and forgive have yet been held tantamount to a release. In that case, the reason given by Lord Chief Baron *Eyre* for the decision, was, that the bond was directed to be given up to the legatee personally; so here the words are, to be delivered "to him."

But in *Maitland v. Adair (d)* the words were fully as strong as these; they are, 'I devise to my brother, the Reverend Mr. *Adair*, 2,000*l.* I also return him his bond for 400*l.*, with interest due thereon, which he owes me.' And that

(c) 1st Cox's P. W. p. 16. 5 Ed. in notes.

(d) 3 Ves. 231.

Lord *Loughborough* held to be distinctly a legacy; and, having lapsed, there was no foundation for delivering up the bond.

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[*THOMSON, Chief Baron.* But 'return,' in that case, is coupled by the word 'also,' with the immediately preceding bequest of a legacy.]

Then, as to the intention of the testatrix, (for it is on the probable intention that Lord *Hardwicke* founds his decision), it cannot be contended that she could design by this bequest a benefit to *Izon*, a stranger. In all cases where a lapse is meant to be guarded against, the will must be particularly and specially penned, otherwise the rule of law must take effect; and so it is held, even in the case of *Sibthorp v. Moxom*. Now certainly there is no special penning here, which expressly or impliedly protects this legacy from lapse; and therefore this bill should be dismissed.

Dauncey, in reply. The express words of Lord *Hardwicke* in *Sibthorp* and *Moxom*, are, that words of forgiveness and remission of debts shall operate as a release in equity; and this case must be governed by that authority. If special words are necessary to prevent lapse, those words being found here, are sufficiently so for that purpose, and so they are construed to be in the same case. It is true, the remission was not to operate till the death of the testatrix; she did not mean, probably, to lessen her income during her life, and its effect might well be suspended till her death; otherwise, that would be

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an objection to every case of a will operating as a release in equity.

The case of *Toplis* and *Baker* resembles the present, only in there being words used in the will, in this case, apparently directory of the personal delivery of the security to the legatee; but it differs from it, and that most materially, in the testator having employed the word give, and not *forgive*; and when the debt is forgiven, the instrument securing it becomes of small importance. In the case of *Maitland* and *Adair* the word used is not of equal force; it is, I *return* the bond: now the term *remit* is the strict language of releases, and the Chancellor's attention does not appear to have been called to the case of *Sibthorp* and *Mozom*.

27th November.

THOMSON, *Chief Baron*. The question arises on the operation of the words "*remit and forgive*," as used in this will, under the circumstances. The money is stated to have been lent to *Whitehurst* alone, and in the will it is called the 500*l.* in which *Whitehurst* stands indebted to her; he died in her life-time, and she surviving him several years, continues to receive the interest on the bond. On her death, this Bill is filed by the plaintiffs, who contend, that the bequest should not be construed to amount only to a mere personal legacy, but to have operated in the nature of a release, which, if it discharged one co-obligor, would have also, it is said, exonerated the other; and it is therefore insisted, that, on her death, the plaintiff *Izon* became entitled to have the bond cancelled, on the ground, that the bequest

bequest, in the present form, was not confined personally and solely to *Whitehurst*. In this case, no one stands in *Whitehurst's* situation, who could have sued on this bond, because, being joint, his executor could not have done so. It is contended, that, if the debt be released, the co-obligor would be entitled to the benefit of it, although not named in the will.

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But it is difficult to consider this bequest as a release, and to distinguish this case so as to take it out of the general rule of law; and if this is a legacy, it must follow the rules of law respecting legacies, one of which is, that if the legatee die in the life-time of the testator, it shall lapse, whether pecuniary or specific, unless it appear clearly to be the manifest intention of the testator that it should be otherwise. Then, as to whether this ought to be considered as a legacy, and to be subject to the incidents affecting legacies;—certainly, in case of a deficiency of assets of this testatrix, even if *Whitehurst*, the legatee, had survived her, this legacy must have abated proportionally, and *Whitehurst* could only have claimed a discharge, *pro tanto*. The great cases on this point have been discussed. In the first case, *Elliott v. Davenport*, there was an express direction that the executors should deliver up the bond into the hands of Sir *Wm. Elliott*, and execute releases to him, and the benefit was held to have lapsed. The word used in that bequest, however, was “give.” In *Sibthorp v. Morom*, Lord *Hardwicke* was struck with the hardship of the case, for there a benefit appeared to have been

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been intended to be conferred on the person, who would have been deprived of the legacy by the death of the intermediate legatee in the life-time of the testatrix. He also relied much on the circumstance of there having been no direction requiring a delivery of the security to the son-in-law personally, which he considered as showing that the testatrix meant it should be delivered absolutely. The case of *Toplis* and *Baker* is very much like this, and, as I think, not to be distinguished from it. The words there were, 'I give to my kinsman, *N. D.* the sum of 400*l.*, which he owes me, on mortgage of his estate in *S.* ; and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon.' That mortgage debt was further secured by bond ; besides which, *N. D.* was indebted to the testator, on another bond, in 200*l.* : both bonds were in the custody of the testator at the time of his death. *N. D.* died in the testator's life-time. After great consideration, the Court held that to be a lapsed legacy. On that occasion, the Lord Chief Baron *Eyre* (that is, the Court) observed, that none of the circumstances which could be *supposed* (and that is an emphatical word) to distinguish the case of *Sibthorp v. Maxom* from *Elliott v. Davenport*, occurred in *Toplis v. Baker*. That the principal ground on which *Sibthorp v. Maxom* was decided, was, that there was nothing in the will to confine the delivery of the bond to the person of the son-in-law ; and that charge, therefore, was not ancillary to the former bequest to him, but amounted to a declaration

tion that, in all events, the bond should be delivered up; and that, of necessity, would operate for the benefit of the representative—that, in *Tophis v. Baker*, the word used by the testator was give, and not forgive; and (what was more material) that the bond was directed to be delivered up to *N. D. personally*, and there was no direction whatever for the delivering up the mortgage; and for those reasons the Court saw no reason for departing, in that case, from the general rule; that a testamentary disposition must lapse by the death of the legatee in the life-time of the testator.

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Now, I have always been at a loss, to understand the distinction between *giving* and *forgiving* a debt. Forgiving, is the only way by which a debt can be given to the person from whom it is due; and there is nothing to be given, (that is to be handed over), except the security. The case of *Maitland* and *Adair* is certainly very material; and the point is plain, though the note is short. The term used there was, “I *return* the bond,” &c.; an expression which led the Court to direct an inquiry of what was become of it, there being a probability that it might have been actually returned; but that was found not to be so, and therefore it was held that the co-obligor was not discharged.

For these reasons, we are of opinion, that the bequest to *Whitehurst* was personal legacy, intended for *his* benefit only; and that it must follow the nature of legacies in general: and, consequently, that the party demanding the bond to be delivered up,

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 and another,
 &c.

up, is not entitled to the prayer of the bill, the legacy having lapsed, by the death of *Whitehurst*, in the life-time of the testatrix.

Per Curiam.—The Bill, therefore, must be dismissed; but without costs; because, as was intimated by

RICHARDS, *Baron*, The case of *Sibthorp v. Morom* is sufficient to justify the parties filing the bill.

THE END OF MICHAELMAS TERM.

SITTINGS AFTER MICHAELMAS TERM.

56 GEORGE III.

GRAYS INN HALL.

1815.

CHURCH v. LEGEYT.

17th December.

WHITMARSH moved, that the Defendant might be at liberty to answer the amendments made in the complainant's bill; undertaking to put in such answer forthwith.

The time allowed defendant to answer amendments in a bill, is eight days, or he must, within that period, apply for further time.

The bill was amended under an order of 3d May 1815. The Plaintiff had lately replied to the defendant's answer to the original bill, and called on the defendant to join in commission. It was stated, that the plaintiff had never called on the defendant for a further answer; and that, if he had done so, the Defendant's Solicitor would have applied for the usual order for time. It might (it was said) make a material difference to the defendant in the consideration of costs.

But, on a special application, to be allowed to answer an amended bill, even after the plaintiff has replied, and called on defendant to join in commission, the Court will permit it, on condition of filing such further answer, and joining in commission immediately.

Dauncey opposed the motion; stating, that the defendant having replied, it was contrary to the course of practice, to be allowed to answer so long after the amendments had been made in the bill.

The

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The rule is, that the defendant shall answer amendments in eight days.

[RICHARDS, *Baron*. Or else he should apply for further time within that period.]

The motion, therefore, should be refused, with costs; but

The COURT, (Defendant consenting to pay all the costs of the application, and undertaking to file his further answer, and join in commission immediately :)

Granted the Motion.

WATTLEWORTH v. PITCHER

Tuesday,
19th December.

It is sufficient for the purpose of obtaining an injunction to restrain a plaintiff at law from proceeding in the action, that the defendant state in his bill and affidavit, that an unsettled account subsists between the

parties, and that plaintiff would be found indebted to him on such account, in a greater sum than he is proceeding for; nor is such a bill demurrable on the ground that the plaintiff, in equity, stating a balance to have been acknowledged to be in his favour, might have pleaded it, at law, on notice of set-off.

existed

existed an account between them, on which the defendant had admitted a balance in favour of the plaintiff, to the amount of 1,400*l.*; but which he contended amounted to 1,600*l.* and upwards, so that the exact amount was not then ascertained; and that the defendant knew when he endorsed the bill, that it would not be accepted; and that he undertook to take it up, when due, in part payment of the balance by him acknowledged to be in favour of the plaintiff. The Bill was verified by affidavit.

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Maddock, in support of the demurrer, submitted, that the Plaintiff, according to his own statement in the Bill, had shown that he had an available defence at Law, and therefore was not entitled to the interference of a court of Equity. He has stated an acknowledged balance due to him, and that would be a subject of notice of set-off, under the statute; and therefore he was not entitled to the Injunction prayed.

Parker, for the Plaintiff, contended, that the balance, whatever it might be, being unliquidated, the plaintiff was entitled to an account; and that alone would be sufficient ground for the injunction. The Court, in these cases, proceeds on the defendant's affidavit, which would not serve him at law.

Per Curiam. This is a Bill for an account, charging that the Plaintiff, at Law, is indebted to the Plaintiff, in Equity, in more money than he is proceeding for. The Injunction must follow the prayer of the Bill.

Demurrer overruled.

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THE ATTORNEY GENERAL v. J. ELLIOTT, J. L.
DES BARRES, & J. F. W. DES BARRES.

17th December.

The Court will not make an order on a defendant, who has answered, in whose hands another of the defendants, who has not answered, has deposited boxes, in which certain specific articles, claimed by the plaintiff, are said to be believed to be—that he shall be restrained from parting with the subject-matter of such deposit, unless the bill be supported by a positive affidavit that the contents of the boxes are actually in danger, *how-
ever strong the inference may be, from the facts stated in the affidavit,* that there exists ground for apprehension that it is intended to make an improper use of them to the injury of the plaintiff.

THE former application to the Court, in this cause, having been refused (*a*), the Bill was afterwards amended, by making *J. F. W. Des Barres* a Defendant, (so as to bring before the Court the party claiming the subject-matter in question,) and, in some other respects: and now prayed an Injunction, and further relief.

Jervis and *Wyatt* now moved, according to the prayer of the information, for the production of the boxes, &c. as on the former motion; and that the two first named defendants might be restrained, by injunction, from selling or disposing of the charts, drawings or plans, plates and impressions, mentioned in the pleadings in the cause, and from delivering the same to the other defendant, *J. F. W. Des Barres*, and from destroying or injuring the same.

The information, so amended, was filed 29th June; but neither *J. L. Des Barres* nor *J. F. W. Des Barres*.

Nor will they make an order on such depositary, requiring that he shall produce such boxes, to be left in the hands of his clerk in Court, for the plaintiff's inspection, in aid of a trial at law, wherein the question of property is in dispute, without a positive statement in the affidavit, that the object of search is, or was, contained in the boxes.

But although the bill do not contain the above requisite positive statements, held to be necessary on such motions, the Court will permit an affidavit to be read in support of the bill, on the ground that such affidavit may supply such omission in the bill, which if it did it appears would be sufficient.

(*a*) *Vide* the text, Attorney General v. Elliott and another, ante, Vol. I. p. 377.

Barres

Barres had yet been served with process, nor had defendant *Elliott* put in his further answer.

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and others.

An affidavit, made by the Hydrographer of the Admiralty, was put in on the present occasion; which verified the facts of the information, as to the employment and remuneration by Government, of the defendant *J. F. W. Des Barres*, as therein stated; and stated, that he *believed* that the original charts, drawings, or plans, were never delivered by him to any person, for the use of his Majesty, but still remained in his (*Des Barres'*) custody or power; and that they were those from some of which impressions had been published by him, in a work, under the title of the *Atlantic Neptune*; and that, among those so published, were many which had been prepared at the expense of Government, by other persons;—that, previous to his departure from England, to take upon himself the appointment of Governor of *Prince Edward's Island*, he had deposited them with the two first-named defendants, and that they were now in their custody or power;—that since the Defendant, *Elliott*, had put in his answer to the first information, the Deponent had received a letter from his (defendant's) solicitor, proposing, without prejudice to the question between the parties, to endeavour to obtain a surrender of the charts, &c. if the Board would agree to pay, as a consideration, the sum of 5,000 guineas; which the Board had refused to do; and that he *believed*, that, at the time of filing the defendant *Elliott's* answer, the said charts were contained in the boxes required to be produced, and left as prayed, and were still there.

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ATTORNEY
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and others.

When this affidavit was proposed to be read, *Heys* objected to its being received; submitting, that this was not a case of irreparable waste appearing on the face of the proceedings, nor had they made out any right to either object of the present motion; and therefore such an affidavit was inadmissible.

[*RICHARDS, Baron.* The affidavit may supply the deficiencies of the bill, in that respect.]

It was urged, that the present attempt was merely made for the fair purpose of facilitating the trial at law of the right of property, which, under the circumstances of this case, could not be done without the interference of this Court, in the way now sought.

[*RICHARDS, Baron.* The affidavit does not state that there is any danger apprehended to the property; nor is there any reason stated for the belief that the charts are in the boxes required to be produced: and without such apprehension and such reason stated, there can be no ground for the motion.]

It is not necessary that probable danger should be sworn to; it is sufficient, in such cases, that it may be inferred, from the tenor of the facts stated, and that inference is unavoidable here. Another consideration for the Court is, that a property of this description, which is obviously of great value as well as utility, both in a mercantile and political point of view, cannot be replaced, if destroyed or injured.

The

The Earl of *Macclesfield* v. *Waters* (b), (a case then depending before the Lord Chancellor), was cited, where, it was said, a similar motion had been granted.

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In that case, *John Blackall*, one of the plaintiffs, was tenant in tail, under the will of his grandfather, *Thomas Blackall*, of certain real estates, of which his father, *John Blackall*, was tenant for life under the said will, and of certain plate, jewels, &c. devised as heir-looms, to accompany the said estate. *John Blackall* (the tenant for life) obtained possession of said plate and jewels on the death of testator, all of which were locked up in an iron chest. The tenant for life being dead, having made a will, of which he constituted the defendant *Davis* and two other persons, who renounced probate executors, the tenant in tail became entitled to the said estate, and the plate and jewels, &c. The bill further stated, that defendant *Davis*, during the life of the tenant for life, had possessed himself of said iron chest, containing the said plate and jewels, for securing an alleged demand which he had on the tenant for life; and that he had pledged the same to *Edmund Waters*, another of the defendants, as a security for money advanced to him in discounting bills, who lodged it with Messrs. *Vere* and Co. his bankers, the other defendants, in whose custody the said chest, and all its contents, then were.

The bill then charged, that defendants had refused plaintiff all access to the said chest; and that

(b) 3 Vcs. & Beames, 16.

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it was the intention of defendants, particularly of *Waters*, to sell the contents, and apply the produce to their or his use.

Vere and Co. the bankers, answered, acknowledging possession, and submitting to the Court. The Defendant *Davis* answered, that he had deposited said chest with *Waters*, as a security for money advanced by *Waters* to him, and expended on the account of *John Blackall*, the tenant for life, for whom, through his means, *Waters* had discounted bills; and that *Vere* and Co. were *Waters's* bankers, and not defendant *Davis's*. He admitted, that before the said plate, &c. had been delivered to him, he had seen a copy of the will of said testator, *Thomas Blackall*, and knew that the same was thereby given as heir looms; but submitted, that the tenant for life had a right to dispose of them as he had done; and insisted on his own and defendant *Waters's* lien. *Waters's* answer insisted on a lien, in respect of the circumstances, and denied knowledge of the interest of tenant for life, and of the contents of the chest.

Under these circumstances, a motion was made by the plaintiffs, that the defendant *Davis* might be ordered to deliver to the plaintiffs the key of the iron chest, admitted by the answer of *Vere* and Co. to have been deposited with them by *Waters*, and to be in their custody; and that they may be ordered to permit the said box, with its contents, to be inspected by the plaintiffs, or any person they should appoint, at all seasonable times, upon request. In support of the motion, it was observed, that, without the

the inspection now applied for, no action of trover could be maintained by the plaintiffs, from their inability to identify the property; and *Blackall* had been one of the executors.

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The Lord Chancellor said, This bill aims only at another mode of discovery, in a way less expensive than by answer; and if the plaintiffs had filed a bill of discovery, in aid of an action of trover, they must have had it. It is now too late, since the case of *Fells v. Read* (c), following *Pusey v. Pusey* (d), to discuss whether this Court will interfere for the specific delivery of a chattel; and, if it will in such a case, *a fortiori*, the restitution of heir-looms must be decreed; upon which there never was any doubt. *By granting this motion, the interest of the defendant Waters is not affected; the plaintiffs, only desiring to know what is in this box, have a right to have from him the information, what those articles are, the specific delivery of which they seek by their bill*.*

The counsel for the Crown then adverted to what had fallen from the Court on the former motion. On that occasion it was said, that there might be confidential communications with other persons in the boxes, which it would be injurious to expose; but submitted that a defendant is not to be allowed to create a privilege to himself, on such occasions, by mixing the things sought to be forthcoming, with such communications.

(c) 3 Ves. 70.

(d) 1 Vern. 273.

* It was observed, by the Court, that the admissions in the defendant *Davis's* answer, in the case cited, furnished the plaintiff with good ground for the application.

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GENERAL
v.
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and others.

Two of the defendants being abroad, the Crown has no means of enforcing their answer; and that is a reason why this application should be granted on the affidavit which has been filed.

Heys, for the defendants, objected, that the Hydrographer's affidavit was altogether insufficient to induce the Court to listen to this application. There is no reason stated for his belief, and no foundation for his knowledge; nor is there any statement of apprehension, that the charts, &c. are in danger. Indeed, nothing that it contains is direct and positive, but all is deduction and implication; and if this motion be attainable, the Court might be called on to enjoin the parting with that which has never been possessed by the person restrained. It is at all times going far, to control *prima facie* rights; and in all such cases the allegations in a bill should be very strong, and supported by the establishment of the facts, on conclusive affidavits; whereas here, there is nothing more furnished to the Court, than the belief of an individual unconnected with the transaction.

Jervis, in reply, pressed, that the inspection required might at least, in all events, be granted, if the Court should ultimately think that an injunction ought not to be ordered.

It is said, that the Crown is not entitled to the interference of the Court, because danger to the property has not been positively sworn; now the affidavit states, that the possession has been already changed, and that, after disputes had arisen as to the

the right of property, between *Des Barres* and the Crown. Now that alone is indicative of imminent danger; but some of these plans have actually been published in the *Atlantic Neptune*, and that is precisely the danger to which literary property is subject, and to prevent which, Courts of Equity always interfere. This is very much analagous to that species of property; and the question between the parties here is, to whom the copyright in these plates and impressions belongs. If, indeed, the defendant, *Des Barres*, has a lien on the property, he may substantiate it by pleading. In that case, the inspection of the subject in dispute will be indispensably necessary; and therefore it is, that the Crown now seeks it of this Court.

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[RICHARDS, *Baron*. There is an important passage in defendant *Elliott's* answer, which states, that certain disputes having arisen respecting the plates and impressions since deposited with, and now in the possession of the defendant, it was referred to the Secretary of the Treasury, who declared them, in his award, to be the property of *Des Barres*, and not of his Majesty.]

That relates only to the plates and impressions, and not to the charts.

THOMSON, *Chief Baron*. In whosever possession these charts and plans are, they are unquestionably the property of his Majesty, inasmuch as they were executed at his expense. This application supposes some of them to be in the possession of some of the defendants, and particularly of *Elliott*.

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It assumes also, what is not in proof, that there exists an intention of disposing of, and parting with them, having first assumed, that they are in the possession of *Elliott*. In fact, the whole proceeds entirely on belief, without stating any reasonable foundation even for that belief. There is merely suspicion stated, and no evidence, that the objects sought are contained in the boxes proposed to be inspected. Now, even supposing that that had been proved, I think, that on such an application, it should have been distinctly sworn, that the defendant intended to make an improper use of what had been so committed to his care; but that not being expressly sworn, the foundation of the application fails.

GRAHAM, *Baron*. However strong the inference may be, that these boxes contain the original plans, as well as plates and impressions, there is no positive statement that it is so. The inference, indeed, may be so strong, as that, personally, one may have no doubt; but judicially, the Court expect positive facts: and without, they ought not to proceed, particularly where the effect of the interference sought, goes to compel the party not to part with what he may not have in his possession; or if he has, the person who placed it in his hands, has also a sort of lien and property in it, and that too to be granted on a summary application.

As to the latter part of the motion, for an inspection of the boxes, that would be an unusual order to make in this stage of the cause; and there
is

is no very distinct account made out, of what it is asked to have an inspection of, or whether it is in the possession of the party against whom it is applied for. Neither the affidavit now put in, nor the amendments in the bill, carry the case so much further than on the former motion, as to induce the Court to grant the motion.

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WOOD, *Baron*, of the same opinion.

RICHARDS, *Baron*. This motion ought clearly not to be granted. In every case for an injunction, such as is now prayed, the affidavit should state strong grounds for apprehending danger, which has not been done here, although it may perhaps, as has been ably argued, have put sufficient before the Court, to raise a strong inference of such danger, and particularly from the circumstance of the publication of some of these plates in the *Atlantic Neptune*, in 1784.

That, however, seems to have been submitted to for thirty years, which may go far to induce the Court to think that it was justifiable; particularly as, in the mean time, the party now complained of, has been appointed by the Crown to a situation of high credit.

He certainly did not put the boxes into *Elliott's* hands for the purpose of publishing these charts; nor is it attempted to be insinuated, that a further publication has been contemplated. The affidavit read does not fully adopt the allegations of the information.

It

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It is therefore impossible that an injunction should be granted under these circumstances; for it would be destroying the principles on which the security of property is founded. Nor, for the reasons already stated, does there appear to me to have been a sufficient case made out, to warrant an order for the production of the boxes for inspection.

Motion refused.

29d December.

The KING v. FREME and others, Assignees of
WHITEHEAD and Co.

If,—on an extent issuing against the acceptors of bills of exchange (drawn in favour of officers of the Crown, for public money received by the drawers, and remitted by them to the acceptor) for the purpose of levying the Crown's debt,—the drawers, after the execution of that process, take up and pay the bills, they are not liable to

MARTIN moved, at the sittings after last *Trinity* Term, that the Deputy Remembrancer might be directed to deliver and pay to the defendants, the two several exchequer bills, for 7,000*l.* and 200*l.*, purchased by him, with the money paid into Court in this cause; and also the sum of 61*l.* 1*s.* 3*d.* cash, standing to the credit of this cause; and that the Sheriffs of *London* might be directed, within a week, to pay over to the defendants, or one of them, the sum of 388*l.* 7*s.* 1*d.* (retained in their hands for their poundage, without prejudice), the debt for which the said extent issued having been satisfied.

The affidavit of the agent of Messrs. *Harford, Davis, and Co.*, on which this application was made, pay the Sheriff's poundage on the levy. And the Sheriff, having retained, under an order of the Court, a sum for poundage in his hands, will be ordered to restore it to the assignees of the bankrupt acceptor's estate.

Semble. Whatever be due to the Sheriff for poundage, in such a case, should be paid by the Crown.

stated,

stated, that the Solicitor for the Crown (Customs), had applied, through him, to Messrs. *Harford, Davis* and Co. requiring their undertaking in writing to pay the expenses of prosecuting this writ of extent, which they refused to do. That they were advised to, and did take up the three bills of exchange which remained unpaid, amounting to 3,858*l.* 18*s.* 4*d.*; the other bill, for 3,858*l.* 3*s.* 3*d.* having been before paid shortly after it had become due: the amount of such four bills, being the debt for which the said extent had issued: all which bills were then in the hands of the deponent, for the use of the defendants. The affidavit further stated, that the bills were all drawn by *Harford* and Co., on *Whitehead* and Co., and became due severally on the 20th and 27th *November*, and 3d and 10th *December*, 1814. It was also sworn that on 16th *November* 1814, *Whitehead* and Co. were declared bankrupts; and that the defendants had been advised by counsel, to defend the said extent, and believed that they had good ground of defence, if it had proceeded to trial.

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The COURT granted, on this motion, an order to show cause.

Abbott now appeared for the Sheriff, and *Dauncey* 28th November.
for the Crown. They stated, that the bills in question had been drawn by *Harford* and Co., who were bankers at *Bristol*, on *Whitehead* and Co., their agents in town, in favour of *Gordon*, the collector of customs at that port, and by him endorsed to the receiver-general of the customs in *London*, (this was his

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his usual mode of remitting the money collected by *Gordon* to town). By the Receiver General, the bills were paid into the Bank of England, who procured them to be accepted, in due course, by *Whitehead* and Co. The extent issued, on an affidavit, that *Whitehead* and Co. were indebted to the Crown in 7,717*l.* 1*s.* 7*d.* for money had and received to the use of his Majesty. It was contended, that the debt having been levied under the extent, the Sheriff was therefore entitled to his poundage, notwithstanding the drawer of the bills had taken them up when they became due; for if he were not allowed to retain it, he would have no means of getting it, except by petition to the Crown, to which course he ought not to be driven.

Fonblanque and *Martin*, for the assignees, contended, that the money having been paid into Court by the Sheriff, did not entitle him to poundage from the assignees, who had no interest in the extent, but were losers by it, from whomever else he might have been entitled to claim it. The foundation of the extent was questionable, the bills not being due when the writ issued; and it had been intended to traverse the inquisition, on the authority of the case of *The King v. Bebb* (a), but *Harford* and Co. having paid the bills, of course it could not be tried, for on that payment the proceedings were at an end. If the debt had been paid out of the money levied on *Whitehead* and Co., the poundage would have been paid by the Crown, and would have been deducted out of the debt.

(a) *Hughes's Report.*

No

No one appearing on the behalf of *Harford* and Co., the Court directed the order to be enlarged, and notice to be given to them, that they might have an opportunity of being heard.

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22d December.

The matter was now brought on again ; and it having been answered to a question from the Court, that the bills had been endorsed after acceptance,—and *Wingfield* and *West* having submitted, on the part of *Harford* and Co., that they ought not to be in any way affected by this motion ;

Dauncey, for the Crown, in addition to what had been urged on the former occasion, now observed, that the object of this attempt was to throw the poundage on the Crown, by concert between *Whitehead* and Co. and *Harford* and Co. ; but that the Crown ought not to pay poundage on a debt so recovered, by which the drawers of the bills (*Harford* and Co.) were benefited. But for the extent, this sum might have been lost to the Crown, to the prejudice of *Harford* and Co., by reason of the insolvency of *Whitehead* and Co. ; that debt was, by its operation, rescued from the bankruptcy ; and the rule is, that the party who is interested in the extent, and who derives a benefit from it, shall pay the Sheriff's poundage.

[*Thomson*, *Chief Baron*. It does not appear that *Harford* and Co. had the permission of the Crown, to use this process for their benefit.]

But a third person coming in, and being benefited, should pay a proportion of the poundage due
on

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on the levy ; and whatever might have been the result of the traverse to the extent which had been talked of, if it had been tried, no good objection to the finding under the inquisition yet appeared. With regard to that question, this extent had not issued for the debt as arising on the bills in question, but for money had and received by *Whitehead* and Co. for the use of his Majesty ; for *Harford* and Co. having received the money from the collector, paid it to *Whitehead* and Co., who accepted the bills for the amount, as agents ; with which bills the Crown had nothing to do. This, therefore, was by no means a parallel case with that of the *King* and *Bebb*, but was analagous with that of the *King v. Boldero*.

[*THOMSON*, *Chief Baron*. That question could only have arisen, if the traverse of the inquisition had been proceeded in.]

It is not the object of this motion to be allowed to proceed with the traverse ; but that the money levied should be repaid, the Crown's debt having been satisfied.

Abbott, for the Sheriff, insisted on the same topics ; and contended, that this was not a case in which the Court would interfere, to take out of the hands of the Sheriff the poundage which he had been permitted to retain by the order of the 4th *March*, which was his remuneration for having done his duty, in executing, for any thing that at present appeared, a valid process. If he were ordered to pay

pay back the poundage, he would have no remuneration; for he has no means, either in law or equity, of obtaining it from the Crown. If the extent had been afterwards overthrown, there would have been an *amoveas manus* ordered; that has not been done, and, in point of form, all is regular. It is said, the Crown's debt has been paid. Now suppose an extent had gone against two persons, and the Sheriff, having levied on one of them, the other chuses to pay the debt; in that case, the Sheriff should not be deprived of his poundage on the levy because the debt has been satisfied by other means. Nor can it be said to be necessary, to entitle a Sheriff to poundage, that a judgment should have been obtained; but the Sheriff, armed with sufficient authority, having levied, must be considered a stranger to all matters taking place between the parties, and should not be deprived of his remuneration on a case made out by affidavits.

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Fonblaque, in support of the order, admitted that the Sheriff might be entitled to poundage; but the question in the present case was, by whom it was to be paid. He denied that the extent had issued to recover a debt for money had and received; and submitted, that, from the exact coincidence in the amount of the bills, and the debt found by the inquisition, it was so obviously the sum secured by the bills which was the object of the extent, that the defendants ought not to have been driven to the inconvenience and expense of a formal traverse, to show that the proceedings on the part of the Crown were premature. The Crown has eventually received from *Harford* and Co. the amount

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amount of the bills ; and on that sum, if it had been received from out of the property of *Whitehead* and Co., seized by the Sheriff, the poundage must have been paid by the Crown. There is, therefore, no hardship in the case ; the question should be altogether between the Sheriff and the Crown ; otherwise the bankrupts estate will have been made to pay the amount of the poundage, *ultra* the debt due ; which is what by law the debtor by simple contract is not liable to pay.

[*Dauncey* observed, that the coincidence was easily accounted for, because the amount of the bills had been previously due from them to the Crown, for public money received by them from the Collector of the Customs, through the medium of *Harford* and Co.]

THOMSON, *Chief Baron*, (*having stated the circumstances and question arising thereon*). This inquisition has found *Whitehead* and Co. indebted to the Crown in the sum of 7,717*l.* 1*s.* 7*d.* for money had and received to the use of his Majesty ; on the other hand, it is said, that the debt, so found, was due on these bills ; and that the assignees might and would have successfully traversed that finding, inasmuch as the bills were not due at the time of the issuing of the writ. Now there certainly is a remarkable coincidence between the sum sought to be levied, and the amount of the bills, which goes, I think, to show, that it is really one and the same debt ; and that the amount of the bills was the money so found to be due by the inquisition, though said to be due for money had and received.

received. The Crown would have had great difficulty in maintaining the extent as for money had and received, supposing it really to have been so, which is scarcely credible.

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Under the extent, the Crown has received all that the exigency of the writ required the Sheriff to levy, that is, the whole debt. No poundage was levied; and whatever might have been due, must have been paid out of the sum levied. Let us suppose that the assignees had satisfied the Crown, and then applied for an *amoveas manus*; the Court could certainly not have refused such a motion; and, therefore, by paying the sum due, the assignees might have been relieved in that way.

It will, perhaps, be hard that the Sheriff should lose his poundage; but one cannot entertain such an opinion of the officers of the Crown, as to imagine that they would suffer that.

The question is, whether the sum claimed by the Sheriff for poundage, should be retained out of the sums now sought to be refunded. I think that it should not: and, therefore, the whole of this order ought to be made absolute.

GRAHAM, *Baron*. I agree with the opinion of my Lord *Chief Baron*, but cannot refrain from expressing my wish also, that the Sheriff should not suffer; though he was, perhaps, somewhat to blame, in not interposing when *Harford* and Co. paid the bills, he having only enough to pay the Crown's debt.

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But we must be guided by the circumstances before us, and under which the money has been paid into Court. No more than the debt was to be levied, and that has been satisfied; therefore all that has been levied beyond that, must be restored. In all respects, therefore, the order must be complied with.

WOOD, *Baron*. I am of the same opinion.—Here are two parties indebted to the Crown, one as drawer, the other as acceptor, of bills of exchange. An extent issues against the acceptors. The drawers, to exonerate themselves, pay the whole; but being so paid after the extent was executed, I consider it as so much levied for the Crown, and, therefore, the Crown ought to pay the Sheriff his poundage: and it then follows of course, that what has been retained by him out of the money levied, must be restored to the assignees.

RICHARDS, *Baron*. I am also of the same opinion. Unless this order is made absolute, we make the estate pay what is really due from the Crown. No doubt the Crown ought to pay the Sheriff.

Per Curiam.—We make the

Rule absolute.

The

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The KING v. MAINWARING & others, Assignees of 22d December.
 BOYD & others.

3d March.

BOYD, and his co-partners, had been found indebted to the Crown, by an inquisition taken under a commission, 12th *March* 1799, in the sum of 100,000*l.*, being money paid to them, in pursuance of his Majesty's warrant of the 4th *December* 1797, for the supply of his Majesty's forces at the *Cape of Good Hope*. They had also been found indebted to the Crown, by another inquisition, taken on the same day, in the sum of 100,000*l.* on bond to his Majesty, for the due performance of a contract with the Navy Board. On those inquisitions extents, tested 23d *January* 1800, issued into the counties of *Herts* and *Dorset*, under which the Sheriff seized the defendants real and personal estates in those counties. By order of the 29th *May* 1800, the real estates were sold, before the Deputy Remembrancer, to whom it was ordered that it should be referred, to take an account of principal, interest, and costs, due to certain claimants under mortgages; with the usual directions; and that the Deputy Remembrancer should pay the Solicitor of the Treasury, the costs, to be taxed, and the expenses of the Crown in enforcing the

The Crown is not entitled to interest on the whole sum liquidated by the Deputy Remembrancer's report, made on reference to him, to ascertain what is due to the Crown for principal and interest on a forfeited bond, where the funds in Court, out of which it is to be ultimately paid, are the produce of the sale of real estates, seized under an extent at the instance of the Crown.

A debt due to the Crown, although originally merely a simple contract debt, if it have been brought into Court in the shape of the produce of a sale under an extent, held by a majority of the Court to carry interest, from the time when the debt shall have been ascertained by the Deputy Remembrancer's report, notwithstanding there should be no specific appropriation in the report, the money being appropriated by law on the confirmation of the report, and therefore bears interest, as being from that moment the proper money of the Crown. *RICHARDS, Baron, dissentiente.*

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payment of the said debts, out of the purchase money, and pay the remainder into the receipt of the exchequer, in reduction of the Treasury debt of 100,000*l.* In *February* 1801, certain other persons, interested in various ways in the property of the defendants, by mortgage and otherwise, appeared and claimed; when it was referred to the Deputy Remembrancer to ascertain all those claims,—the priority of the respective incumbrances—of all other claimants,—and of the debts due to the Crown, with regard to each other; which was reported, and confirmed.

The Deputy Remembrancer certified, by a subsequent report of the 16th *July* 1808, that the defendants had entered into a bond, dated 7th *February* 1798, to his Majesty, in 100,000*l.*, for the performance of a contract with the Commissioners of the Navy, to furnish, for the naval service in India, star pagodas to the amount of 50,000*l.*, which he afterwards failed to perform: that the Lords of the Treasury, *by warrant of 4th December* 1797, directed the Paymasters General to pay the defendants, *Boyd, Benfield and Co.* 100,000*l.*, to be by them remitted to the Deputy Paymaster at the *Cape*, for the supply of the troops there; which was accordingly paid to them on the 9th *June* 1798, but had not been by them remitted to the *Cape*: that extents (as above mentioned) had issued, under which the estates in *Hertfordshire* were seized: that the indentures of lease and release, (the mortgage), bearing date the 3d and 4th *July*, had been executed to *Wall and Hoare,*

Hoare, for securing the sum of 80,000*l.* : that a commission of bankruptcy issued against *Boyd* and *Co.* 25th *March* 1800 ; and that defendants were chosen assignees of their estate and effects, to whom a bargain and sale, and assignment thereof, was executed, 5th *April* 1800.—He then found that the charge of his said Majesty, in respect of the said contract and bond, of the 7th *February* 1798, was first in point of priority ; that the said charge of his Majesty, in respect of the draft, bearing date 9th *June* 1798, issued in consequence of the said warrant of 4th *December* 1797, was second ; the charge of the said *Wall* and *Hoare*, in respect of their said mortgage, was third ; and that the charge of the assignees of the bankrupts, under the bargain and sale, was last in point of priority.

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The claims on the *Dorset* estates seized, and their respective priorities, were also referred, and reported ; but the money produced by that sale was insufficient to satisfy the navy debt, which stood first.

And he certified, by the same report, that he found there was then due, in respect of the said contract or bond, the whole of the said sum of 50,000*l.*, mentioned in the said contract, together with the sum of 23,852*l.* 14*s.* 3*d.* for interest ; and he found that his Majesty had received and retained, in respect of the said sum of 100,000*l.*, issued on the treasury warrant, sums amounting to 43,334*l.* 1*s.* 3*d.* ; reducing that debt to 56,665*l.* 18*s.* 9*d.*, which he found to be the balance then due ;

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due; that 80,000*l.* was still due to *Wall* and *Hoare*, the mortgagees, with 40,131*l.* 10*s.* for interest, from the said 4th *July* 1798 to the said 16th *July* 1808, amounting together, to 120,131*l.* 10*s.* due on the mortgage.

That report was excepted to, on the part of the Crown, because the interest had been computed from the time when the bills given by *Boyd* and *Co.* had become payable; whereas it should have been computed from the date of the contract and bond: and it was ordered, that the Deputy Remembrancer should amend his report accordingly.

On the 2d *March* 1809, an order was made, on the motion of the Solicitor General, that the purchasers of the estates seized under the extents, and all claimants thereon, should show cause, on the first day of the next *Easter* Term, why the Deputy Remembrancer should not pay, out of the funds and cash in Court, in trust in these causes, the sum of 50,000*l.* due on the Navy bond, and also the 26,102*l.* 14*s.* 9*d.* for interest up to the 16th *July* 1808, (the date of the Master's report), making together, the sum of 76,102*l.* 14*s.* 9*d.*, to the Treasurer of the Navy; and also why it should not be referred to the Deputy Remembrancer, to compute interest on the said sum of 76,102*l.* 14*s.* 9*d.* from the said 16th *July* 1808, to the time of paying the said sum out of Court; and why he should not pay to the Solicitor of the Admiralty his taxed costs; which order was enlarged, and in the mean time (9th *June* 1809) it was referred to the Deputy Remembrancer

Remembrancer to inquire of Mrs. *Benfield's* claim of dower, and other subjects, on which he afterwards made his report.

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3d March.

Jervis and *Wyatt*, on the part of the Navy Board, and *Dauncey* and *Abbott* for the Treasury, now moved, in pursuance of notice, that the Deputy Remembrancer's report, of 23d *February* 1815, might be confirmed; and that it might be referred back to him, to compute *subsequent interest on the sum of 78,102l. 14s. 9d.* by his report of the 4th of *May* 1809, certified to be due to his Majesty, for principal and interest on the contract and bond therein mentioned; and that it should be paid out of the sum of 70,337l. 17s. 11d. 3 *per cent.* consols. now standing in the name of the Deputy Remembrancer, to the credit of this cause, and arising out of the purchase money of the estates seized and sold under the *Dorset* extents, (after certain deductions paid to other claimants), to the Treasurer of the Navy; and to pay out of the proceeds of the estates sold under the *Hertfordshire* extents, what may afterwards remain due of the Navy debt, and costs; and that, after such payment, he should, out of the funds in Court, arising from the sale of the *Hertfordshire* estates, pay the sum of 56,655l. 12s. 9d., due to the Crown in respect of the money issued on the Treasury warrant; and that he should compute interest on that sum, from the said 16th *July* 1808, to the time of payment.

The Counsel for the Crown contended, that the Deputy Remembrancer's report operated in the nature

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nature of a judgment; and that the debt found to be due, should therefore carry interest from the time of its confirmation. With respect to the Navy debt, there could be no doubt, as that was a specialty debt. The only question there would be, whether the interest was to be computed on the original debt of 50,000*l.* alone, or on the aggregate sum of 78,102*l.* 14*s.* 9*d.*, to which it had increased by the subsequent accumulation of interest, and to which it had been found to amount, by the Deputy Remembrancer, at the date of his report.

This claim is on a bond, in a penalty of 100,000*l.*, and the Crown has a right to interest up to the amount of the penalty. It is clear that, in the case of a mortgage, the whole sum liquidated by the report carries interest, as was held in *Creuze v. Hunter (a)*; and it cannot be contended, that a subsequent incumbrancer should be put in a better situation than the Crown, which is reported to have the priority.

As to the Treasury debt, although originally, perhaps, a simple contract debt, yet when, by the exertions of the Crown, the debt has been recorded and recovered, (for the inquisitions were not traversed), and the money paid into Court, it became the property of the Crown; and if certain claims which were then made, prevented the Crown from receiving the money, that share of the fund to which it was afterwards ascertained, by the report confirmed, that the Crown was justly entitled, ought to carry

(a) 2 Ves. 159.

interest

interest from the time when that right had been so established, and was formally acknowledged; had it not been for those claims, the Crown would have actually received the money, and then it would have been made productive; and when the difficulties which stood in the way of the payment to the Crown, are removed, the sum due should carry interest, as being the property of the Crown, vested by the effect of the confirmation of the Deputy Remembrancer's report.

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[THOMSON, *Chief Baron*. Your proposition is, that, if not entitled to interest as such, and *eo nomine*, yet that you are entitled to interest on so much of the fund as was purchased with the Crown's money.]

It is certainly not, strictly, interest on the debt due to the Treasury, which the Crown is now seeking to have computed; but merely that, in the mean time, until the rights of other claimants are adjusted, the settlement of which delays the actual payment of the money to the Treasury, the sums reduced, as it were, into possession by the Crown, and ultimately declared by the Deputy Remembrancer's report, (which, in this Court, is in the nature of a judgment), to have been recovered by the Crown process, as constituting the Crown's debt, may carry interest, to be invested with the principal, for the benefit of the Crown, until it shall be paid. From the return of the inquisition, the debt was no longer a simple contract debt.

[By the COURT.—The debt is on record at the
return

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return of the inquisition, and becomes a specialty debt. It could not otherwise bind the lands; were it still a simple contract debt, the Crown could not resort to the real estates.]

The Treasury only require interest from the time that that part of the funds in Court which was claimed by the Crown, was finally declared by the Court, through the medium of the Deputy Remembrancer, to be the right of the Crown. That part of the fund has, among the rest, been made productive; and the Crown claims the interest made by that principal which has been declared to be its property.

Martin and *Abercrombie* appeared on the behalf of two of the vendees, under the sale of the estates seized.

Shadwell, for the unsatisfied mortgagees, and

Forblanque, and *Phillimore*, for the assignees under the commission, opposed the motion; insisting, that the Crown had no title to interest on the present entire amount of the Navy debt, as augmented by the subsequent accrual of interest, nor on the Treasury debt at all; that being a mere simple contract debt, and therefore not carrying interest pending proceedings in courts of equity, in diminution of the general fund; and if it were allowed in the present case, there would be no surplus left. The report could neither give a new character of principal, to the interest on the Navy debt, in the first case; or alter the original nature of the Treasury

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Treasury debt, in the latter. As to the debt having become recovered money, from the date of the report, that is not so, for there must have been a specific appropriation of so much of the fund by the report, to have enabled the Crown to claim interest on that ground; and there was no such appropriation here. There has been, indeed, an order to show cause, why the money should not be paid to the Crown; but that order was enlarged, and has never been made absolute. If the Treasury debt has a priority, (as it has been reported to have), it is from its prior date, and that is the 7th *June* 1798, when the Crown's money came to the hands of the bankrupts. The mortgage to *Wall and Hoare*, bears date the 9th *June* 1798; therefore, the priority found by the report, is the priority of a simple contract debt which did not carry interest, and that debt was not found by inquisition till the 12th *March* 1799. In the case cited, the main question was, whether certain annuitants, and legatees were entitled to interest, upon what was due to them, from the confirmation of the report; and the chancellor held, that they were not. Perhaps they rely on what was there thrown out as to the case of a mortgagee; and certainly, the chancellor said, where the owner comes to redeem a forfeited mortgaged estate, and the Court orders that on payment on such a day, he shall redeem, and he lets the day elapse, of course he must pay interest; But the crown is not in the situation of a mortgagee: it is not a specific incumbrancer; and the claim of interest, as now made, is not on the ground of the debt having been found by the inquisition, but by the Deputy Remembrancer's report.

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report. If what is sought by the present application were practicable, it would be established by numerous instances of its occurrence. Yet the Crown has not been able to find, among the records of the Courts of Equity, one case in support of this novel and extraordinary motion, which is as little founded in principle as in practice. There can be no difference between the Crown and a subject; and, hard as it may seem, the cases are all against giving interest to simple contract claimants, even where the reference ordered may have been pending for many years, as was the case with the legatees of the Duke of *Queensbury*, who were not permitted to have the stock appropriated. In the case cited, of *Creuze v. Hunter*, it was observed, that the funds being productive, makes no difference. A similar question was brought before the Court on a former occasion, in the *King v. Rumbold*, and failed.

It was objected to the mode of the present application, that it should have come on in the form of exceptions to the Deputy Remembrancer's report; otherwise, the Court would be discussing points which it is the duty of that officer to settle between parties.

The Court, considering it a question of great importance, took time to give their opinion.

22d December.

The Question was this day again brought before the Court on minutes proposed, in the form of an application for further directions on the report. The admiralty having, in the mean time, abandoned the

the claim for interest on the whole liquidated sum found to be due to the Board, the only remaining point was, whether the claim of interest by the Crown, on the Treasury debt, could be supported as a legal or equitable right. The general tenor of the arguments was much the same as on the former occasion. As there existed a difference of opinion, the Court delivered their opinions, *seriatim*.

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THOMSON, *Chief Baron*. The Crown's debt having been brought into Court by the proceedings under the extent, must necessarily form a part of the funds standing in the Deputy Remembrancer's name, to the credit of this cause. It seems to me, therefore, that the single inquiry which we have to institute, on the present occasion, is, what part of the fund belongs to the Crown, as representing the debt found to be due? When that is once ascertained, all the interest and dividends that have accrued on it from that time, follow the principal, and is as much the property of the Crown as the principal itself.

GRAHAM, *Baron*. I do not recollect this question ever having been considered before; but there is a principle in this Court, that the Crown's debt being ascertained and put on record, has, to all intents and purposes, the effect of a judgment; and if, in the execution of that judgment, the money is brought into Court, from that moment, it appears to me, that the claim of the Crown attaches; and though it is not specifically appropriated, the Crown
having

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having that money in Court, on its seizure by the hands of the Sheriff, it is from that moment applicable to the discharge of the Crown's debt. If, therefore, when it is brought into Court, though mixed with funds applicable to other debts, and that compound fund is invested, you involve in the investment, that part of the fund which is the Crown's, and is only not in the Treasury, because, from the natural delay which takes place in the investigation of certain claims, it could not be immediately paid in. I conceive it is the duty of the Court to uphold the Crown's remedy, and follow up the money of the Crown, when once brought into Court, though not specifically appropriated; and when the Court perceives that the money is actually made a productive fund, I do not see that it should be less beneficial to the Crown, because it is involved with other sums applicable to different purposes. Therefore, with deference to my learned brother *Richards*, whose being of a different opinion should excite much doubt in my mind, I should have thought I saw clearly, that the Crown had a right to the money, and to take it, as well as what it produced, as appurtenant to the principal sum. On that view, it appears that the course is plain and distinct; the money is the property of the crown, and the Crown is as much entitled to the produce of it, as to the principal sum.

Wood, Baron. I must own, I am of the same opinion; an extent has issued at the suit of the Crown, and the money has been actually levied under it. From that time it becomes the property of

of the Crown ; but it happens there are some claims made on it by other people, which prevents its immediate appropriation ; and, therefore, it is said, it cannot be made productive to the Crown. But the King was entitled to it the instant it was levied, and if it had then been paid over, might have been made a profit on it. In the mean time, it is invested in the funds, and produces a profit. Now, I am of opinion, that the money having been once levied, is appropriated by law at the return of the execution, for the benefit of the Crown ; and that it being from that moment the property of the Crown, the Crown is consequently entitled to the interest and dividends accruing from it.

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RICHARDS, *Baron*. It gives me great pain to differ from Judges of so much more experience, especially on a case which has been so little before my notice. I have inquired anxiously, whether there is any difference in law, between the case of the Crown and of a subject. No authority has yet been cited, to show that any distinction at all exists. I am therefore left to consider, whether there is any distinction in principle ; and I cannot discover any. It appears that the Crown has, by its execution, done that which a subject might have done by execution on a common judgment. The money is brought into Court by the levy on the part of the Crown, it is true ; but when it is there, it is the money of the Crown, certainly, but only so far as it has priority of the other persons who have claims on that money ; and the Crown, as it appears to me, is in the same situation here as any other claimant. The
Crown,

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Crown, it is true, is to be paid first ; but, if this were the case of a common suitor, every man's experience, I think, goes with me in saying, that he would have no immediate title to the fund itself. You are only to take the fund as a security, to be turned into money, to pay that which is due for principal and interest. Now, in this case, if the Crown had a charge upon the estate, which was clear and beyond all doubt, the Crown might have applied for an appropriation. If an appropriation had been made, there is no doubt the Crown would have been entitled to the sum set apart, but only as a common suitor would be, who has a charge made distinct by the Court, by an appropriation, which is a very common case. Nothing of that sort takes place ; and, at this moment, the fund is, in Court, applicable to the payment not only of the Crown, but of all the other incumbrancers, equally, without any priority in point of time of payment, provided the fund is sufficient to pay all the claims on it.

The case of *Tew v. Lord Winterton* (b) must be in every one's recollection. There, after a very long delay in the Court of Chancery, and the Master's Office, the fund (which was not at first nearly sufficient to pay the creditors, and whose fund it was at that moment, because no one else could make a claim to any part of it, there being at first no residue likely to remain after payment of the debts), increased so considerably during the discussion of the questions which arose in that case,

(b) 1 Ves. 451, and 3 Br. C. C. 489.

that

that the creditors were paid all that was due, and the family received a very large surplus, in consequence of a rise in the funds. Now, that case I conceive to be an authority, with respect to suitors in general; and, as nobody has shown me that there is a difference between the case of the Crown and any other suitor, I cannot see any difference between that case and this; nor can I see that, because the Crown's execution sells the estate, that confers such a present title to its share of the fund, as to give a right to the produce arising from it from that time; but that all other claims are to be equally considered, as well as that of the Crown.

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IVATT and others v. WARD.

Saturday,
23d December.
11th November.

DAUNCEY, and *Parker*, moved, to suppress the examination of witnesses taken on behalf of the Plaintiff, before *J. Elderton*, one of the Examiners of this Court, at *Cambridge*, on the 25th *September* last; and that, in the mean time, publication might be suspended.

The Examiners of this Court have no authority to examine witnesses at a greater distance from London than *ten miles*, unless by consent: & such consent must be express.

The motion was founded on the affidavit of the defendant's solicitor; which stated, that notice had been served on their clerk in Court, by the plaintiff's solicitors, of the examination, now sought to be set aside, being about to take place at *Cambridge*,
dom: *sed quare*, whether a *subpoena* lies, to bring the witnesses to London.

They may examine witnesses brought up to town from any part of the king-

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on the 25th *September*, “when and where (*the notice added*) “the above-named defendant, and an “Examiner or Commissioner on his behalf, may be “present, if it is thought proper;” but that they having been advised that such examination would be wholly irregular, gave notice that they would not attend, but should move the Court to suppress any such depositions as should be taken, for irregularity, with costs—that the plaintiff’s clerk in Court, afterwards called and informed deponent, that the intended examination would be regular, but that the notice of it should have been accompanied with an undertaking, on the part of the plaintiffs, to be at the charge of the witnesses coming to, and returning from *London*, for the purpose of cross-examination, if required; that that undertaking he then proposed, which this deponent declined to accept,—that, on the 21st *September*, such an undertaking was sent to deponent, who, not being satisfied with the terms of it, returned it to plaintiff’s solicitors, on the 23d, with a draft of such an undertaking as deponent would consent to receive, (the material alteration in which, from the one already tendered, consisted in the introduction of a stipulation, that “no person to be examined should be owners or “occupiers within the parish * of *Cottenham*, or be “in any manner interested in the decision of this “cause)”—that that undertaking was returned

* The bill was filed against the rector of the parish of *Cottenham com. Cambridge*, for a discovery, to aid the defence of the plaintiffs in a suit of the rector against them, for tithes.

to the deponent on the 25th, signed by the plaintiff's solicitors, with an omission of that part of it only, which excluded the owners or occupiers of lands from examination, accompanied with a notice of the names of the witnesses intended to be examined.

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The examination of the witnesses took place ; and the plaintiffs obtained an order, on the 6th *November*, that publication should pass, unless cause should be shown on that day se'nnight.

In support of the motion, it was insisted, that the examination was irregular, and contrary to the established practice and rule of the Court. In *Fowler's Practice (a)*, it is said, that ' By the ' 25th general rule of this Court, no commission ' to examine witnesses is to be executed in *London*, ' or within ten miles thereof, without leave of the ' Court first had upon an affidavit, of the inability ' of a witness to travel, or other special cause ; ' otherwise, depositions so taken, are to stand, *ipso facto*, suppressed. The Lord Chief Baron, and ' and the rest of the Barons of the coif, have each ' of them a sworn Examiner, duly authorized, ' whose office it is to examine all witnesses in causes ' arising in *London*, or within ten miles thereof.'

There is no instance of an Examiner ever having exceeded that distance ; and, in so doing, he exceeds his authority.

(a) Vol. II. p. 62.

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[THOMSON, *Chief Baron*. There must necessarily be some restriction. An Examiner has no power to administer an oath; he is merely an officer appointed to examine witnesses for the Baron whom he represents.]

In this instance, the witnesses had been sworn before the *Lord Chief Baron*, on the circuit, at *Cambridge*; but, at so great a distance from *London*, the Examiner had no right to examine without a special commission.

[THOMSON, *Chief Baron*, (*having referred to the officer*). There is no instance of an Examiner examining on a commission. It always goes to special commissioners; and, if an Examiner should be named as one, the other party would have a right to strike him off.]

This mode of proceeding would preclude him from so doing; and the Examiner, having examined in chief at *Cambridge*, would have had no right to cross-examine the witnesses here in *London*, for both examinations must take place concurrently. Nor was there any consent given on the part of the defendant which might be said to justify this departure from the rule; for the undertaking required by his advisers was not signed, as drawn up by them, by the plaintiffs agents. There can be no pretence, therefore, for allowing these depositions to pass publication.

Fonblanque, Martin, and Meggison, on the
 other

other side, contended, that even if it were admitted that there existed, in point of fact, such a rule as that the Examiner could not exercise his function beyond ten miles from *London*, yet, his office being founded on considerations of convenience to suitors, the rules which govern his official proceedings should not be treated as so strict and inflexible, as not to bend to the object of its institution, particularly where both parties, to save expense, and for mutual accommodation, agree to depart from the regular course. It is not shown, that there is any such rule or practice limiting the extent of the Examiner's power; and the next sentence in *Fowler's Practice* to the passages quoted, is, ' But witnesses may be examined before a Baron, though the cause may arise in the most remote part of the kingdom. And, in page 133, is this passage, (after adverting to the power of each of the Barons, to appoint a sworn officer to examine witnesses brought before them): ' And though the 25th general rule of the Court directs, that a commission to examine witnesses shall not issue within ten miles of *London*, it does not prescribe any limits to the examination of witnesses before a Baron, in causes arising in any part of the kingdom, where it is for the convenience or accommodation of any of the parties that their witnesses should be examined before a Baron in *London*.' Now, the examination before the officer is precisely the same thing. The course is, to prepare the interrogatories, then the witnesses are sworn before a Baron truly to make answer; and counsel are responsible that the interrogatories

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contain nothing improper; and the witnesses are then examined by the Examiner.

In any point of view, there has been no such irregularity here as to entitle them to call on the Court to suppress the depositions; for even if there should have been any irregularity in the form of the proceeding, all the material requisites established by the Court have been observed and complied with. The Examiner was as ministerially competent to examine at *Cambridge*, as to have examined here. It is the constant practice to bring up witnesses to be examined; and what irregularity is there, where convenience arises, in the Examiner going to the witnesses? The cause too, (it should be observed), now stands within thirty of being heard.

[RICHARDS, *Baron*. Is there any instance to be found, either in this Court or the Courts of Chancery, of such an examination having been proceeded on without consent?]

Then the question will arise, whether there has not been a consent here, or at least, that which may be considered equivalent to a consent. The undertaking proposed was adopted, certainly with an alteration, but such an alteration as could make no substantial difference in effect. The words occupiers of land, were struck out, because there might be some who, though occupiers, might nevertheless not be interested; and they would have been necessarily admissible, or, if interested, their depositions would have been suppressed, of course. Two or three instances

instances were produced, of cases, where the Examiner had acted beyond the limit now contended for, but these were by consent.

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Dauncey, in reply, submitted, that the practice, according to *Fowler*, was clearly with the defendant. It is expressly stated, that an *Examiner's* office is to examine witnesses in causes arising in *London*, or within ten miles thereof; but (it is added) witnesses may be examined before a *Baron*, where the cause arises in the most remote part of the country, making an express distinction.

[*THOMSON, Chief Baron.* That is an improper distinction: there is an incorrectness in so attempting to distinguish the officer from the Baron. The examination of an Examiner must be taken to be the examination of the Baron, before whom the witness was sworn.]

On the other side, in point of practice, no instance can be produced of its ever having been done; in the cases cited, the distance has been within ten miles, or there has been an express consent: but it is even doubtful, whether consent would cure the irregularity. Parties are not entitled to dispense with the rules of Court on the score of convenience; all they can be entitled to do, would be to bring it before the Court. There is not even convenience here, or a saving of expense, to excuse it; for it seems, if the witnesses might be examined in chief at *Cambridge*, they must be cross examined here. The question is, whether there is

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any rule ; and whether it must prevail, or may be dispensed with ?

THOMSON, *Chief Baron*, now delivered the opinion of the Court. His Lordship took a succinct view of the object of the motion, and the mode in which it had come before the Court. On the terms of the first notice which had been given of the examination intended to take place, his Lordship observed, that he could not understand that part of it which related to the attendance of an Examiner or Commissioner, on behalf of the defendant, as such examinations were always proceeded in *ex parte*, and one Examiner was sufficient ; nor could any other be necessary or proper : and as to the attendance of a Commissioner, there certainly could have been no such person.

On the proposed amendment of the undertaking, which required that no occupier, or other person interested in the event of the cause, should be examined in support of the *modus*, he observed, that that would render it necessary to inquire what species of *modus* it was intended to set up ; for, if it should be a parochial *modus*, then, undoubtedly, a parishioner would be interested. That amendment, however, was not acceded to ; the examination was taken, and it is now moved to suppress it.

The question, therefore, is, whether the examination so taken, was, under these circumstances, regular, and according to the practice of the Court ? There was no consent, in this case, that the examination

mination should take place; and its regularity depends on the question, whether an Examiner of this Court can go into any part of the kingdom, for the purpose of examining witnesses.

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Now the rule certainly is, that the Examiners shall not have power to take examinations beyond ten miles from London; and there does not appear to have been any instance, where an Examiner has ever examined witnesses at a greater distance.

The Examiners have authority, certainly, to examine witnesses in town, when brought up from any part of the country; but as to whether a subpoena would lie, to procure the attendance of witnesses, we do not at present give any opinion.

We think, that the objection of the Examiner's having exceeded his authority in this instance, is well-founded; and that this examination is such as the practice of the Court does not warrant. The depositions, therefore, must be suppressed; and, as the ground is irregularity, with costs, of course.

END OF SITTINGS AFTER MICHAELMAS TERM.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

HILARY TERM,—56 GEO. III.

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FISHER *v* HODGKINSON.

*Wednesday,
24th January.*

A defendant having moved for costs, for not proceeding to trial according to notice, may afterwards, and in the same term, move for judgment, as in case of a nonsuit, in *this* Court: but the Court, on a satisfactory affidavit, will discharge the latter rule, on the terms of the plaintiff giving a peremptory undertaking, and paying the costs.

OWEN showed cause against a rule obtained by *Richards* last term, for judgment, as in case of a nonsuit, for not proceeding to trial. The objection made was, that the defendant had previously, in the same term, obtained an order for the payment of costs, for not so proceeding; and therefore, it was now submitted, that, according to the case of *Ogle v. Moffit* (*a*), in the Common Pleas, the present rule ought not to have been granted, and should be discharged. It is true, it is laid down in *Tidd's Practice* (*b*), that the

(*a*) Barnes, 316.

(*b*) *Tidd's Practice*, p. 773.

Court of Common Pleas have since over-ruled that case, by the decision in *Dorant v. Rouvellet* (c); but in fact, there has been, in the same Court, a more recent determination, in the case of *Clarke v. Simpson* (d), wherein the doctrine in *Dorant v. Rouvellet* is expressly held not to be law; and the Court, therefore, refused to grant the motion for judgment, as in case of a nonsuit, after a motion for costs for not proceeding to trial; and one of the reasons given is, that a defendant might thus put the plaintiff to the costs of two motions, to obtain what the defendant might have had on one application.

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An affidavit was then read, on the part of the plaintiff, stating, that the reason of the plaintiff's not having proceeded to trial in this cause, was the absence of a material witness, who could not be found, after due diligence, so as to be served with a subpoena; and that, therefore, he had countermanded the notice, that before, and after notice of trial, he had received applications on the part of the defendant, to settle the cause by arbitration; and that the defendant had no just defence.

Under these circumstances, it was submitted, that the defendant was not entitled to have the rule made absolute.

Jones, D. F. in support of the rule, relied on the practice in the Court of King's Bench, where those motions were not only always made as they

(c) 2 N. R. 247

(d) 4 Taunton, 591.

had

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had been in the present instance, but their object could be obtained in no other way. That Court considered these as motions *diverso intuitu*; and although, whenever the defendant obtained judgment, as in case of a nonsuit, he is considered entitled to costs; yet there might be cases in occurrence, where the Court might think proper to give him costs, although they should refuse him the judgment; and it is clear, that costs cannot be moved for, even in the Court of King's Bench, for not proceeding to trial, after having moved for judgment, as in case of a nonsuit (*e'*).

The COURT, after referring the question of practice to the Deputy Clerk of the Pleas, who reported, that it was the usage of this Court to allow both these motions as now made; and having required from the plaintiff a peremptory undertaking to proceed to trial at the next assizes, and that he should pay the costs of this application;

Discharged the rule *.

(*e'*) Tidd's Practice, p. 773.

* Vide *Morgan v. Bidgood*, ante, Vol. I. p. 61, where the like motions were made in the same course, and granted. In the note to that case, will be found the reason why these applications are made the subject of distinct motions, although costs, for not proceeding to trial, are always given in this Court, on obtaining judgment, as in case of a nonsuit, on the same ground.

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KIDWELLY CANAL COMPANY v. RABY.

Friday
26th January.

AN action had been brought, to recover the sum of 165 *l.*, the amount of six calls on the defendant, who was alleged to be a proprietor of three shares, of 100 *l.* each, in an undertaking, for the purposes of which, the plaintiffs had procured an Act of Parliament. On the trial of the cause before *Mr. Baron Wood*, at the last assizes at *Hereford*, the plaintiffs recovered a verdict, under the direction of the learned judge, reserving to the defendant, liberty to move to set it aside, and enter a nonsuit, if the Court should be of opinion, that, under the circumstances of the case, as proved on the trial, the defendant could not be considered as having such an interest in the shares of the concern, as rendered him liable to the calls of the Company on him, as a proprietor of those shares.

Jervis having obtained the rule, on the ground that the defendant was not, at the time of the calls made on him, a proprietor, his Lordship read his report of the evidence, which proved,—that the defendant had been one of the original subscribers to the first proposals of uniting for the purpose of effecting the objects of the Company, and to the intended measure of obtaining an Act of Parliament, as the foundation of the undertaking;—that

One of several persons, who have subscribed an agreement, *inter se*, to promote a joint undertaking, or common purpose, cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest of the subscribers.

And if an Act of Parliament have been passed, for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the Act, by having, during the progress of the bill, renounced, before the Committee, all further

connection with the undertaking, and desired that his name might be, in consequence, omitted in the Act; or can the circumstance of his name so being omitted, have the effect of disengaging him,

he

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he had signed his name to a paper, purporting to be a list of subscribers to the plan, and worded thus :

‘ 22d August 1811.

‘ A List of Subscribers, to a fund for carrying
 ‘ into execution a plan for the improvement of
 ‘ the harbour of *Kidwelly*, and making proper
 ‘ communications therewith, from the several
 ‘ collieries in the neighbourhood, by a canal, or
 ‘ rail-roads.’

That the Act was obtained in *June* 1812 :—
 that during the progress of the Bill, which was
 opposed, the defendant having attended some of
 the meetings of the committee, expressed a wish
 at one of them, that his name might be withdrawn
 from the subscription, and his name was therefore
 not inserted in the Act,—that he had attended
 various meetings as chairman, and had voted, and
 otherwise taken an active part there :—but that, at
 a meeting of the Committee of the House of Com-
 mons, held in *London*, during the progress of the
 Bill, the defendant, disapproving the proceedings,
 signified, that he should withdraw his subscription,
 and desired that his name might not be inserted
 in the Bill, to which the Chairman of the Com-
 mittee assented : and that when the Act passed,
 his name was, in fact, omitted ;—that he had
 attended a meeting of subscribers in *November*
 following, and seconded a motion for the appoint-
 ment of a clerk. On this evidence, his Lordship
 held, that the defendant was not at liberty to
 withdraw his name, without the consent of the
 other subscribers. It had been proved, also, that
 three shares had been subsequently assigned by
 another subscriber (*Brogden*), to the defendant,
 which

which were held to be void, not having been entered in a transfer book, as the Act directed.

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Dauncey and *Abbott* now showed cause. They contended, that the defendant still continued to be a proprietor of three shares in the undertaking, notwithstanding his declaration of a determination to withdraw his subscription. He appeared to be an original subscriber to the undertaking, and he took an active part in the execution of it, both before and after passing the Act. That what he had done after the Act had passed, could not have been in virtue of any pretended transfer of shares by another proprietor to him, (which, not having been *bona fide*, and regularly entered, in pursuance of the Act, were a mere collusion and nullity); but in virtue of his original subscription. If the undertaking had turned out to be profitable, there was nothing in the supposed withdrawing, which could have precluded him from a participation of those profits as a proprietor, under the original subscription; and from that subscription he could not withdraw, to the prejudice of those who had embarked with him.

Jervis, and *Taunton*, in support of the rule, submitted, that the defendant was at any time competent to abandon the project, previous to the passing of the Bill; and that having declared himself no longer a subscriber, at a Committee of the House, when the Solicitor for the Company, who must be presumed to represent them, was present, the chairman of the committee assenting to it, he had become completely discharged. In consequence

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consequence of that declaration, his name had not been inserted in the Act, when the name of no other subscriber was omitted, except those of subscribing peers, which had been omitted in consideration of their rank; and that, whatever he had done since, had been done by virtue of the shares assigned, whether the assignment of them was legally valid or not. This action depends altogether on the Act of Parliament, and to that he was no party. To make out the plaintiffs case, the defendant must be shown to be a proprietor; and, after such a declaration of having withdrawn, on his part, would this Court have permitted him to come and claim a share of the profits? and, if not, he should not be considered as liable to calls. The subscribers alluded to in the Act, are those subscribing after the Bill passed.

THOMSON, *Chief Baron*. The form of this action has been rightly adopted, under the direction of the Act. It was incumbent on the plaintiff to show that the defendant was a proprietor, and the question is, whether the evidence, in fact, does. It is said, that he became a proprietor by signing a paper, by which certain persons agree to unite for the purpose of carrying the undertaking into execution. An Act of Parliament, to enable them to effectuate their intention, was passed, incorporating certain persons, by name, as proprietors, for carrying the undertaking into execution, (among whom that of the defendant does not occur), together with such persons as shall hereafter be possessed of any shares in the undertaking.

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undertaking. No doubt, the defendant was one of the parties agreeing to undertake the execution of the projected plan, and the Act which was obtained, proceeded on the footing of that agreement. It seems, that while the Bill was in progress, the Defendant objected to being longer considered as one of the subscribers, and requested his name might be struck out. But, in fact, the Act passed, and not only all were incorporated who had subscribed, but all who should thereafter be possessed of any share or shares in the undertaking. There is no way of becoming possessed of shares but, by subscribing; and subscribers were not possessed of shares till the Act passed, but on being passed, it had reference to every person who had before that time subscribed, without rejecting any, and they then became entitled to profits.

As to the defendant's withdrawing, on which so much stress has been laid, he could not discharge himself by any declaration to that effect, nor was the Committee competent to consent to such withdrawing. It cannot be said to have been the intention of the Legislature to have discharged him, for that would have required an express clause, excluding him by name. Now he answers the description of persons enumerated in the Act, down to the time when he is said to have assumed the character of proprietor, by means of fictitious assignments, when he had in himself a much better title than *Brogden*, by this assignment, could give him. The words are, 'those who have subscribed, or shall hereafter subscribe;' therefore, the Act

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includes all who had subscribed, and he has done no act to discharge himself from the effects of his subscription. And being within the terms of the Act, he would have been entitled to a share of the profits of the undertaking, as a proprietor, he must also be considered liable, as such, to losses.

GRAHAM, *Baron*. As to the defendant's voting as assignee of *Brogden*, that is out of the case. The main question is, whether he was bound by his original subscription; and if so, whether he was subsequently released. The agreement he subscribed was binding, nor can a man renounce by such means as *Raby* adopted. *Lewis*, the Solicitor, did not represent the proprietors; he was merely employed in conducting the Bill through the House, and had no power to consent to the defendant's withdrawing. Nor did the omission of his name by the Committee, discharge him, more than Lord *Cawdor* and Lord *Dynevor*. There must, for that purpose, have been an explicit consent of the other adventurers. If he could have discharged himself at any time, when the application had been made to Parliament it was then too late.

WOOD, *Baron*. The two questions in this case are, 1st, whether the defendant was an original subscriber to the undertaking, intended to be carried into effect by that Act; and 2dly, whether, if he were so, he has discharged himself by what has been done.

It is immaterial to ascertain whether the defendant
voted

voted in respect of his original subscription, or of his assigned shares. The heading of the instrument differs only in words, but not in substance, from the Act. They are called subscribers, in each.

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Then is he discharged from his subscription by what he has done? Wherever there is an agreement between several, one party cannot withdraw without the consent of the others, as in the case of creditors having agreed to take a composition, one cannot retract without the consent of all the rest. Here, it is admitted, there was no consent; and his declaration of abandoning, amounts to nothing.—*Lewis*, the Solicitor, could not control the Committee, or their acts, if there at the time; and had he expressly consented to such withdrawing, it would have been without authority, and it would be absurd to suppose him authorized.

It has been said, that the defendant does not bear the character of a proprietor of shares, and is therefore wrongly sued, as such; but I think he is, in fact, a proprietor, although not included by name in the Act of Parliament; for the Act says, "*who shall be possessed of shares*," not who shall subscribe. Now, did *Raby* possess shares? He did not till after the Act had passed; but then he became entitled. The words of the act are retrospective, and all subscribers are made entitled. He is, in fact therefore, one of the corporate body, although not named in the Act. By the 31st section, it is provided, that the Company shall not be authorized to proceed

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with the undertaking till a sufficient number of subscribers shall have been obtained, who will undertake to raise the sum of 20,000*l.*, *including the money already subscribed*, it is clear, that the Legislature considered all who had subscribed before the passing of the Act, to have been entitled to shares, as well as those who subscribed afterwards; the words "including the money already subscribed," includes the persons who had subscribed that money. So also, the 69th and 70th sections, describing the persons liable to calls; "every person or persons who hath, or have already subscribed;" and such person being called on, must pay. The defendant, then, not having legally withdrawn his subscription, is a proprietor, and as such, liable to calls, and must therefore pay them when made.

RICHARDS, *Baron*. One of the necessary means for carrying into execution the plan, towards which the persons whose names appear to this paper have subscribed, was the procuring an Act of Parliament. That was a necessary step, and must therefore be upheld. *Raby* was a subscriber to this paper, and is bound by its terms, to adopt every measure necessary to its execution. If *Raby* had not endeavoured to withdraw, there would have been no doubt of his liability: then the question becomes, whether he has in fact withdrawn; and I think he has not, inasmuch as he could not do so, without the consent of all those with whom he had become engaged in the undertaking.

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As to what passes before a Committee, it is in great part, *sub silentio*, and any assent of *Lewis's* there, would be nugatory. It is admitted, that till he had withdrawn, he was bound.

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Rule discharged.

SMITH v. SMITH & others.

Saturday,
3d February.

THE point, in this case, arose on the trial of an issue, under an Inclosure Act, tried at the last assizes for *Chester*, before Sir *Wm. Garrow* and *Mr. Justice Burton*; when the Jury, under the Judge's direction, found a verdict for the defendants.

To make title to an allotment, under an Inclosure Act, of a sixteenth, to be set out for the person claiming to be Lord of a certain manor, it is sufficient, on the trial of an issue under the Act, to show that he is owner of the soil. It need not be proved that there is such a manor existing in law, or that the claimant is Lord, properly so called.

The Act of Parliament, amongst sixteen allotments on the inclosure, had, after reciting that certain persons were joint Lords of the manor of *Wallasey*, and that *Richard Smith*, Esq. (the plaintiff), was, or claimed to be, Lord of the manor of *Poulton cum Seacombe*; and that *James Mainwaring*, Esq. claimed some right or title thereto, or interest therein, &c., directed, that the part or share of the commons and waste lands in the said township of *Wallasey*, to be allotted to the Lords of the said manor; and also, that the part or share of the commons and waste lands in the said township of *Poulton cum Seacombe*, to be allotted to the Lord of that manor, should be

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equal to one-sixteenth part in value of such commons and waste lands to be inclosed. It contained the usual saving clause, as to the right of all persons interested.

By the report of the evidence, it appeared, that the plaintiff attempted to prove, both by documentary and parol evidence, the existence of the manor in question, and the exercise, by his predecessors, of manorial rights. The first (in point of date), of the former, was the will of Mr. *Smith*, in 1774, in which it was called a manor.

The proof of exercise of rights, consisted in evidence of plaintiff's predecessors having built a ferry-house, and let it ;—that he possessed the fishery ;—that he had taken gravel and stone for ballast, from the spot in question, and had built a lime-kiln there ; and an instance was adduced, of an acknowledgment taken from a person building a cottage on the waste, and other acts of ownership.

On the part of the defendants, the evidence was negative ; tending to show, that *Poulton cum Seacombe* was not a manor, and had no qualities of a manor ; that, in a succession of inquisitions, *post mortem*, it was not mentioned as a manor ;—that it neither had courts or steward, no waifs, strays, &c., or pound, till 1774.

It was the opinion of the *Chief Justice*, that there should have been proof given of the actual existence of a manor ; and as that had not been shown, he
directed

directed the Jury to find a verdict for the defendants; who found that there was no such manor; which, the Court said, was a verdict for the defendants.

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8th November.

Jones, D. F. now moved, to set aside that verdict, and that a new trial should be awarded, on the ground, that the question to which the attention of the Jury was directed by the Court, was not the question in the cause;—the inquiry was not whether this were or were not, to all intents and purposes, a manor, or not; or whether the plaintiff was, strictly speaking, Lord: but whether, under the circumstances, he stood in the situation of the person designated by the Act, as he to whom the allotment, in respect of the property, was to be made. And, on that question, the verdict was against evidence; for he was proved to be the owner of the soil, and to be the only person who could have or claim any right (for *Mainwaring* had withdrawn his claim); and he was therefore, the only person to whom the allotment could be made. But even admitting that this was a question of manor or no manor—this was such a manor, by reputation, as the Courts would recognize; for it is not necessary that all the incidents of a manor should exist, to confer on it that denomination; and if it might be called a manor, as the Act had called it, it would be sufficient for the purposes of the acts.

He cited the case of *Curzon v. Lomax (a)*, where, in trover, for trees claimed by the plaintiff, as belonging to the waste of the manor of *Wild*, on

(a) 3 Espinasse, N. P. 60.

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an objection taken to evidence of its having been so described, in an old deed and in a private Act of Parliament, as proof of the place called *Wild* being a manor, Lord *Ellenborough* expressed himself of opinion, that it was not necessary to prove the holding of Courts, to show that the place was a manor ; and held it to be sufficient, if it was a manor by reputation. In *Soane v. Ireland (b)*, which was an action for a false return to a *mandamus*, the second count of the declaration stated a seizure in fee of the manor of *Frome Selwood*. The evidence proved it to have been once a legal manor, but that it had ceased to be so for want of freehold tenants, though, in other respects, the right was proved as laid ; and the plaintiff recovered. And, on motion for a new trial, Lord *Ellenborough* held, that it preserved its prescriptive right, although its manorial rights might have been severed. It would still be such a manor by reputation, as would satisfy the allegation, and it was not necessary to prove it a continuing manor for all purposes. So here, the question was, not whether *Smith* was entitled to a manor, but whether he had such an interest in the *locus in quo*, as would give him a right to the allotment under the Act ; and he urged, that as what the plaintiff claimed, had been declared to be a manor by the Act itself, that would be sufficient for the présent purpose.

3d February.

Williams, J. and Spence, showed cause. They observed, that, in the cases cited, the places mentioned had once been manors ; whereas, in this

(b) 10 East. 259.

instance,

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instance, *Poulton cum Seacombe* had not been shown to have ever been a manor, and was therefore not entitled even to the appellation of a manor. On the contrary, as far as negative evidence could do so, it is proved never to have been reputed a manor. The rights, of the exercise of which, acts had been proved, might all have existed independently of an existing manor. The fishery might have been an exclusive grant; such a right may exist *in alieno solo*: so also the ferry; the landing-place was in the highway; the gravel taken might have been from between the high and low water-mark, which would have been the property of the Crown(*b*): all of which rights might have proceeded from the Crown, without necessarily having any reference to an existing manor. The Act itself distinguishes the manor of *Poulton cum Seacombe* from the other manors, by carefully avoiding terms of certainty. It says, that *Smith* claimed to be Lord of the Manor; but when speaking of the Lords of the other manors, it says, "are Lords of the said manors." If, indeed, the designation had been positive, such a recital, in a private Act of Parliament, would not have conferred on this plaintiff what was not his before. A recital, repugnant to the fact, is nugatory. In the case of the Earl of *Leicester v. Heydon* (*c*), a recital of an attainder was held not to be equivalent to an attainder *de novo*; nor does such a recital operate as an *estoppel* (*d*), and cannot *estop* the Jury. The affirmative proof was clearly on the plaintiff, at the

(*c*) *Siderfin*, 149.(*d*) *Plowd. Rep.* 396.(*c*) *Br. Abr. tit. Estoppel passim*.

trial;

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trial ; and they made the attempt to prove as much, but wholly failed. The verdict could not, therefore, be against evidence, for they did not prove the affirmative of that on which alone their cause rested. If there existed no manor, the plaintiff could not be Lord. The *Chief Justice* was therefore warranted in leaving the whole case to the Jury ; and their verdict for the defendants should not be disturbed.

Holroyd, and *Jones*, in support of the rule. They insisted, that the inquiry of whether there existed a manor, or *Smith* was Lord of that manor, was beside the question. The allegation in the declaration, on which the issue had been taken, was, that the plaintiff was entitled to the allotment in dispute, which the plea denied. On that issue, the main and only question which arises was, whether the plaintiff had such an interest in the soil as entitled him to the allotment ; and that he proved by the acts of ownership and of exercise of rights, given in evidence. If the commissioner had allotted this sixteenth to any other person, the plaintiff, in an action to recover possession, would have averred, that he came within the description in the Act of Parliament, of Lord of the manor of *Poulton cum Seacombe* ; and, if he had not allotted it to any one, the plaintiff might have moved for a *mandamus*, as Lord of the manor. If the plaintiff really had had no right, because there should have turned out to be no such manor, none could have taken it. Such a description of the plaintiff was sufficient for the purpose of allotting the share with certainty. He was sufficiently Lord to answer that description, for
that

that purpose. In *the King v. the Bishop of Chester (e)*, it is held, by *Holt*, Chief Justice, that every manor consists of demesnes and services ; and a fine, *sur grant and render* of the services, destroys the manor, yet it remains a manor by reputation. In 2 Roll. Abr. 712, pl. 7, it is laid down, that if, *in ejectione firmæ*, (where, being on a point of pleading, great strictness is observable), a lease of a manor, &c. be pleaded, of which manor the tenements in the lease be parcel, and issue be joined, *quod non demisit manerium* ; and the Jury find, by special verdict, that there was no frank tenement, but divers copyholders of the manor : and that it was not known by the name of a manor, for that it was not a manor in law, for default of frank tenements, although it was alleged in pleading, by learned men, to be a manor ; yet, being an adverse action, and triable by *lay agents*, whether, in fact, the tenements passed by the lease, the verdict must be considered as for him who pleaded the lease of the manor ; for the substance of the issue was, whether there was a demise or not. Having again adverted to the modern cases already cited, it was submitted, that enough had been put in proof to show, that the plaintiff was owner of the soil ; that that was really the only question in the cause ; and that it was not touched by the finding of the Jury, for which reason it was insisted there ought to be a new trial.

GRAHAM, *Baron*. I cannot help thinking it fit that this question should be presented to the Jury

(f) *Skinner's Rep.*

under

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under a different view. This is a case where the verdict is for the defendant generally. If the Court had nothing to go on but this answer of the defendant, one might have a difficulty in considering how to deal with the case. It is alleged, and the argument proceeds on this, that the verdict went for the defendant, inasmuch as the plaintiff did not prove that this was a manor, or reputed manor. Notwithstanding that, according to the view I have, it does seem to me, from the Act of Parliament; that, of necessity, there is strong evidence that the plaintiff is the person who sustains the character of Lord of the manor of *Poultou cum Seacombe*; for see what is the object of the Act; it is to inclose certain commons, with some of which we have nothing to do; and, among others, those of *Poultou cum Seacombe*, the common waste lands, containing about eighty-two acres. Then the Act goes on to state, the rights of the different persons, always looking to who the person is who has a right to the soil. It states those rights in a general way; and it appears, from the Act, to be doubtful whether this is properly called a manor. When it states the rights of the other Lords, it states them as clear; but, with respect to the right of the person who is to have this allotment, it states it as matter of doubt. The Act of Parliament only means to point out the character of the person by whom the allotment is to be taken. In this case it plainly intimates, that the person in contemplation is the owner of the soil. Pursuing this idea, the Legislature, leaving it matter of doubt whether it was a manor, goes on to ascertain what shall be the

the shares and proportions allotted to each. It then says, that the several other Lords shall have a sixteenth; and, in the same clause, expressly declares, that the Lord of the manor of *Poultou cum Seacombe*, assuming that there is a Lord, shall have a sixteenth. Then the Act of Parliament gives no power to set apart the several sixteenths, reserved to those properly called Lords; but it gives the commissioners power to deal with the residue only. Then what can be more clear and distinct, than that one-sixteenth part is given to the person who can sustain, and who does sustain the substantial part of the character of being owner of the soil? This sixteenth would remain unallotted, if this person is not within the operation of the Act of Parliament. If the sixteenth is not given to this gentleman, who has endeavoured to establish his claim, it is given to nobody at all; for no other person assumes the character of owner of the soil. I lay aside the little doubt from the conflicting claim of Mr. *Mainwaring*, for he does not interfere. At one time, he claimed some portion, but he has fairly relinquished his claim, and says he has no right to any share: and the commissioner has allotted to this plaintiff a sixteenth. If there were any other persons who were entitled, in case he did not get it, they would be entitled to have their aliquot part of his share; but that cannot be, for he is to have this sixteenth, and no other person can take it, if he does not. Does he approach to the character of Lord of a manor? You go to Domesday Book, and you bring no evidence of a manor. Indeed, there is no mention of this as a manor, till 1770. There is a total destitution

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destitution of evidence to prove it a manor. From the nature of the case proved, it is not difficult to see that this is a kind of mutilated manor, *membris disjectis*. It appears that there is a market: then, as to the plaintiff's being owner of the soil, he has a ferry, and a landing-place to set down the passengers. Did he exercise any other rights? There never was an instance where the Crown ever granted the spot of land, between high and low water-mark alone; therefore he must have been the owner of the land adjacent, at those periods when he exercised rights, by digging gravel, and doing other acts. All this imports that he had a grant from the Crown, co-extensive with his own manorial rights. In the North of *England*, there is nothing more common than to have these rights, that at one time were in the Crown. Under these circumstances, it appears to me, that he has proved himself to sustain the material part of the character which the Act of Parliament had in contemplation, when it enacted that those who had the right of common should be compensated,—that they should receive the given compensation of a sixteenth share, before their land should be touched. It does strike me, that this case has not, by the learned persons who tried it, been seen in the proper point of view; for I think the weight of the evidence is in favour of the plaintiff, and that he sustains the character the Act of Parliament describes.

Wood, *Baron*. There are two questions here,—the one is, whether there is a manor of *Poultton cum Seacombe*; and the other, whether the plaintiff is entitled

entitled to this allotment of the waste. Now I think, from the Act of Parliament, it is pretty clear, and must be taken for granted, that there is a manor of *Poultton cum Seacombe*. It begins by reciting, that Mr. *Smith* makes a claim to be entitled to the manor, and to be Lord of the manor; that is an admission, in the Act, that there is such a manor; and in all the rest of the Act, it considers *Poultton cum Seacombe* as being a manor, and having commons and waste lands; then, in the saving clause, at the last, it is particularly mentioned as a manor. It must be taken, therefore, on this Act of Parliament, that there is such a manor. Now the meaning is not, that it shall be a manor, to all intents and purposes; for if it is a manor by reputation, that is sufficient. It may be, that nothing remains but the waste; but being a manor by the waste, it belongs to the Lord, and the person entitled to the waste, may be called Lord of the manor. And, therefore, this plaintiff comes within the meaning and letter of the Act of Parliament. That he is the owner of the waste, there is not a tittle of doubt, for he has exercised every act of ownership that is generally exercised.

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First, it is proved, that the ferry-house is built on the waste; next it is proved, that he gave *Farlow* a bit of ground on the waste, which he inclosed: it is also proved, that he built a lime-kiln. All these are strong acts of ownership. *Thomas Harrison* proves, that, thirteen years ago, he inclosed lands from the waste, and paid 2s. 6d. per year. It is said, he also asked leave of the freeholders, who had a right of common.

That

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That does not militate against the right of the Lord; therefore, it seems to me, the Jury were wrong, in going on the idea of this being no manor. Consider the reason of the thing: why is it given? In general, it is expressed to be given in right of the soil. Why is it given to the Lord of the manor? It is given to him in right of his soil; for the Lord has an interest in it. In the character of Lord, he always has a share given to him under every Inclosure Act.—Considering it every way, there is no doubt there should be a new Trial.

RICHARDS, *Baron*, concurred.

Rule absolute.

*Wednesday,
7th February.*

DOE *ex dem* HERVEY v. ROE.

After several ineffectual attempts made to serve a tenant in possession, with declaration in ejectment, on occasion of the last of which, his servant admits that he is in the house, but refuses to permit the person applying to see him, if the declaration be then delivered to the servant, the Court will make an order that such service shall be sufficient.

DAUNCEY had, on a former day, obtained an order to show cause, why the service of the declaration in this cause should not be held sufficient, now moved to make the rule absolute.

It appeared by the affidavit, on which the rule was applied for, that the deponent had called several times on the tenant in possession, for the purpose of serving him personally. On some occasions he was told by the servant that he was not at home; and the last time, the same person said, that his master was then in the house, but would see no

person,

person, unless he first sent in his name and message.

On that information, which was an admission that the tenant in possession was then in the house, the deponent delivered the declaration to the servant, as service on the master.

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The COURT, under these circumstances, made the

Rule absolute.

The ATTORNEY GENERAL *v.* SMITH.

RAINE moved, to be allowed to change the *venue* in this case; which was an information, filed by the Attorney General against the defendant, who was a tanner, on the 48th Geo. III. ch. 60, § 7, for exercising the trade of a leather-cutter.

Same Day.
A defendant, in an information at the suit of the Attorney General, is not entitled to a change of *venue*, without his consent.

The *venue* was sought to be changed from *Middlesex* to *Lincoln*, on an affidavit, that the defendant and the witnesses resided wholly in *Lincolnshire*.

The COURT refused the application; holding, that the *venue* cannot be changed in an information at the suit of the Attorney General, without his consent.

Motion refused.

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Friday,
9th February.

31st January.

SMITH v. BULKELEY.

On declaration in covenant running to great length, this Court will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea.

It is the practice of this Court to file the original draft of declaration, and deliver the copies to each party, on stamp.

ABBOTT moved for a rule to show cause, why the defendant, in this action of covenant, should not, under the circumstances of this case, have an imparlance till the next term.

In the affidavit of the town agent of the defendant's attornies, it was stated, that the *subpœna ad resp.* was returnable the 8th *November* last; that on the 20th of *January*, (the 19th being the last day of the time within which, by the practice, the declaration should have been delivered, to entitle the plaintiff to a plea of this term), a draft of a declaration in this cause, only (not on stamp) had been delivered at the office of his clerk in Court, or had been filed; and that it was very long, and special.

The question therefore was, whether what had been done amounted to a due delivery of a declaration before the assign day of the present *Hilary* Term. If it were a good delivery, the defendant would be obliged to plead; if not, he would be entitled to an imparlance till the next term.

Jones, D. F. showed cause; and submitted, that the Court would not now, for the first time, decide, that the practice objected to by this motion (which the Deputy Clerk of the Pleas, and all the practitioners of the Court, would certify to have been the established usage of the Court beyond memory),

memory), is contrary to what it ought to be. It has been the constant practice to put the draft on the file; and it is the business of the defendant's clerk in Court, to take a copy out of the office before he pleads, which ought always to be done on stamp, as it has been in the present instance: and the defendant has been served with a notice to produce the declaration, so taken out of the office, to enable the plaintiff to show that it is stamped. The plaintiff also receives a copy on stamp; so that, in fact, there are two stamped copies delivered. Such is the peculiar usage of this Court; and therefore, what has been done is perfectly regular in practice, and correct in point of time.

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[Wood, *Baron*. Can it be a perfect declaration, till it has been engrossed on stamp; and may it be filed before?]

By the practice of this Court, it certainly may. It is stamped before the defendant receives it, because he cannot take it out of the office, but on stamp.

Dauncey, on the other side, contended, that what had been called the practice of the Court, was nothing more than an arrangement at the office; that without proper stamps, it was not an authenticated declaration, and the defendant was entitled to consider and treat it as no declaration; and if so, this declaration has not been delivered in time to entitle the plaintiff to a plea of this term.

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v.

BULKELEY.

[WOOD, *Baron*. The copy which is engrossed on stamp, is, in fact, the only declaration.]

[GRAHAM, *Baron*. There being two copies of the declaration delivered on stamp, by the practice, it seems, that in this Court the draft is really the declaration; and that is all that is put on the file in any case.]

THOMSON, *Chief Baron*. In the present instance, independently of the question as to the practice, the declaration being in covenant, and running to great length, that alone would entitle the defendant to an imparlance; therefore, let him have it. If there is any thing in the objection to what is called the practice, the Court will take that into consideration, and give their opinion at a future time.

For the present, we will, on the first ground, only make the

Rule absolute.

Saturday,
10th February.

THE ATTORNEY GENERAL v. THACKER.

If there have been any delay in the interval between the first process issuing against a defendant, and the filing of the information against him, and, during that interval, he has gone abroad on his duty, as well as some of his witnesses, the Court will postpone the trial, on motion.

given

given for the ensuing sittings, should be postponed till the revenue sittings after next *Easter Term*.

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The object of the proceeding was, to recover the penalty imposed by the 17th *Geo. III.* ch. 41, § 1, for clandestinely unshipping goods at sea from a homeward bound East Indiaman.

It was stated in the affidavit, that the defendant was mate of the ship, on board which the offence was charged to have been committed; that though he had been held to bail in *October*, the information had not been filed till the present term; that the said ship had sailed again for *China* on the 23d of *December*, and the defendant had also gone thither on board. That he had a good defence, which could not be supported, but by witnesses, many of whom had also sailed as part of the ship's crew. The necessity of his doing so, was much pressed, for that, otherwise, a defendant might thus be ruined on a mere charge of an offence against a statute.

Issue was not joined.

Dauncey opposed the application, on the part of the Crown; submitting, that the defendant having been arrested, was aware of the proceeding going on against him, and might have provided for his defence before the ship sailed; and that thus a defendant, by withdrawing himself and his witnesses, might avoid trial in all such cases.

Per Curiam.—The gist of the application is,
I 3 that

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that the information was not filed before the defendant had sailed; and it is not to be expected that he should give up his voyage.

Motion granted,

With liberty to the Crown to examine any witnesses then in attendance who cannot attend afterwards; and the defendant to cross-examine—the interrogatories to be exchanged before examination taken.

Monday,
12th February.

Saturday,
27th January.

USHER, (*qui tam*), &c. v. LYON.

A plaintiff (*qui tam*) in an action on the statute for not receiving a licensed pilot, demanding to be taken on board and put in conduct of the vessel, not proving production of his license by the pilot, at the time of such demand, will be nonsuited: although it was in evidence that the pilot had it in his personal custody at that time, and that the master did not require the production of it.

THE plaintiff (suing on behalf of himself and the guild or brotherhood of masters and pilot seamen of the *Trinity-House* of *Kingston-upon-Hull*), brought the present action of debt under 52d Geo. III. ch. 39, sec. 34, “That it shall be lawful
“ for any licensed pilot to supersede any person not
“ licensed as a pilot in the charge of any ship or
“ vessel within the limits of his license: and every
“ master of any ship or vessel who shall continue to
“ act himself as a pilot, or who shall continue any un-
“ licensed person, or any licensed person acting out
“ of the limits for which he is qualified as a pilot,
“ after any pilot licensed to act within the limits in

Coasting vessels, not within the 52d Geo. III. ch. 39. or compellable to take a pilot on board, on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and the exemption in the Act is not confined to coasters using the navigation of the river *Thames* alone.

“ which

“ which such ship or vessel shall then actually be, shall
 “ have offered to take charge of the ship or vessel ;
 “ and every person assuming or continuing in the
 “ charge or conduct of any ship or vessel without
 “ being duly licensed to act within the limits in which
 “ such ship or vessel shall actually be, after any pilot
 “ duly licensed and qualified to act in the premises
 “ shall have offered to take charge of such ship or
 “ vessel ; shall respectively forfeit, for every such
 “ offence, a sum not exceeding fifty pounds, nor less
 “ than twenty pounds,” against the master of the
 sloop *Hope*, for not superseding an unlicensed
 person, by giving up the conduct of his vessel to a li-
 censed pilot, who had offered himself to take charge of
 her, when within the limits of his license. It was
 tried at *York*, at the last summer assizes, before *Mr.*
Justice Bayley. The declaration consisted of twelve
 counts, charging breaches of the pilot acts on two
 several occasions, varying the description of person
 acting as pilot, to meet each case in the section.

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From the report of the evidence, it appeared, that
 the defendant was master of a coasting vessel (*the*
Hope), trading between the port of *Bridlington*,
 in the east riding of the county of *York*, and
London ; that he was, on entering *Bridlington*
 Harbour, piloted by *Robert Burton*, an unlicensed
 seaman ; that, on bearing up for the harbour, his
 vessel was boarded by *Robert Hutchinson*, a pilot,
 duly licensed by the corporation of the *Trinity-*
House of Kingston-upon-Hull, who demanded the
 charge of the vessel, which the defendant refused to
 give him. The pilot did not produce his license,

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when he demanded to be put in charge of the vessel, or tell the master that he was licensed ; that he had the license in his pocket, and that the master did not require to see it ; that the defendant knew *Hutchinson*, having lived in the same town with him, and knew him to be a licensed pilot.

On that evidence, it was objected by the counsel for the defendant, 1st, That, as the pilot had not complied with the terms of the 46th section of the Act, which enacts, “ That no person shall take charge of
 “ any vessel, or in any manner act as a pilot, or receive
 “ any compensation for acting as a pilot, unless he
 “ shall be authorized thereto by some lawful license,
 “ nor until such license shall have been registered by
 “ the principal officers of the Custom House of the
 “ place, at or nearest to which such pilot shall reside,
 “ (which officers are hereby required to register the
 “ same without fee or reward), nor *without having*
 “ *his license at the time of his so acting, in his personal custody, ready to be produced, and which*
 “ *he shall actually produce to the master of any ship*
 “ *or vessel, or other person who shall be desirous*
 “ *of employing him as a pilot,*” the action could not be maintained ; and 2dly, That this being a coasting vessel, came within the exemption, which is in these words, “ And also save and except as well all
 “ colliers as also all ships and vessels trading to
 “ *Norway*, and to the *Cattegat* and *Baltic*, and
 “ likewise round the North Cape, and into the
 “ *White Sea* ; and save and except all constant
 “ traders inwards from the ports between *Boulogne*
 “ inclusive and the *Baltic*, such ships and vessels
 “ having

“ having *British* registers, and coming up the
 “ North Channel by *Orfordness*, but not other-
 “ wise ; and likewise save and except all coasting
 “ vessels, and all *Irish* traders using the naviga-
 “ tion of the river *Thames* as coasters,” was not
 compellable to receive a pilot on board at all. The
 learned Judge having put it to the Jury to find,
 whether the defendant knew the person applying
 for the conduct of the vessel to be a licensed
 pilot ; and whether, by refusing to employ him,
 without demanding to see his license, he had not
 dispensed with the production of it ; both of which
 they found in the affirmative.—His lordship then
 nonsuited the plaintiff, on the first objection made
 at the bar, notwithstanding the finding of the Jury ;
 reserving the points, at the same time, by giving
 liberty to the plaintiff to move to set aside the non-
 suit, and take a verdict for 20*l.*, being a single
 penalty, taken at the lowest.

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Topping having obtained a rule in *Michaelmas*
 Term ;

Dauncey, *Holroyd*, and *Raine*, now showed
 cause. They turned the main part of their atten-
 tion to the objection, that the license should have
 been produced. This is an Act highly penal ; and
 the plaintiff should not only, for that reason, be
 held strictly to the letter ; but the masters of these
 vessels, being placed in a hazardous situation, in
 point of responsibility to their owners, the exer-
 cise of great caution in the reception of pilots
 on board should be allowed them. Placed, there-
 fore,

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fore, between their responsibility to their owners, on one hand, for accidents happening to the vessel, and the penalty, on the other hand, for not employing a pilot, clear proof of the production of the license by the person demanding the charge, ought to be held to be in all cases indispensable. His knowledge that *Hutchinson* was a pilot, is not proved; though by the Jury it is so found. Even if it were so, it would be no ground for dispensing with his producing the license. He might *have been* a pilot at one period, and discharged at a subsequent time for gross misconduct; but the master had no right to waive the production of the license, for that is a duty wisely imposed by the Act on the pilot;—the words are, “and which (license) he shall *actually* produce.”

[WOOD, *Baron*. The subsequent words are, “to the master of any ship or vessel, or other person who shall be desirous of employing him.” The master, in this case, was not desirous of employing him.]

It would be useless to show it to persons who were desirous of employing him. Those words must be taken to mean, persons required to employ him, or to apply to persons other than the master, to whom it is, in all events, actually to be produced, and who is, by the Act, obliged to employ him.

Then, as to the question of exemption.—It is to avoid that provision, that they have not chosen to found their claim to the right of appointing pilots on the statute, but have preferred to go upon the usage. That, however, could not avail them here; for

for such a right cannot exist by prescription. Usage in *pais*, not founded on record, would not support this action. It can only be founded on charter, or matter of record, as allowance in a Court of Record (a). The express objects of the exemption are coasting vessels generally. It is not confined to vessels navigating the river *Thames* alone, but is general, as appears by the addition of the words, "as coasters," following "*Irish traders navigating the river Thames.*" The words between "coasting vessels" and "as coasters," omitted, the two last words would be absurdly redundant. Those final words must have been employed to qualify the exemption of *Irish traders* using, &c. lest all *Irish traders* should be included.

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Topping, Littledale, and Thompson, in support of the rule. They observed, that this question had been raised merely with a view to try the right of the *Trinity House* to appoint pilots in exclusion of unlicensed persons. To dispose of the objection as to usage;—whatever might have been the doctrine in ancient times, it was now become such settled law, by a series of modern decisions, that evidence of long usage was unanswerable, that that may be left for the more immediate subjects of discussion. In this case, a licensed pilot demands the conduct of the vessel; he has his license about him, but does not produce it. Now the plaintiff contends, that it is not necessary he should produce it till demanded

(a) Foster, Cr. L. 266. 9 Coke, 27. b. 28. a.—Case of the Abbott, of Strata Mercella.

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of him. He is expressly required to have it *ready* to be produced; if he were peremptorily, and, in all events, required by the Act to produce it, whether demanded or not, his being required to have it ready would be nugatory, because it is involved in that requisition. In truth, he is actually to produce it only to the person desiring his assistance as a pilot, and that, to show that he is the person named therein, (for his description is endorsed) (*b*), which would be totally useless, if the master should refuse to employ him.

Then the question of exemption occurs. According to the grammatical construction of the words in which that exemption is expressed, it must be taken to be confined to such coasting vessels as navigate the river *Thames*, and as coasters. A coasting vessel might be used on other occasions than as a coaster, as a vessel other than a coaster (such are the *Irish* traders), may proceed on a coasting voyage; or, if the words, 'as coasters,' are to be confined to the effect of qualifying the words *Irish* traders, *quâcunque viâ*, the words 'navigating the river *Thames*,' are, it is obvious, equally referable to the words coasting vessels, as to *Irish* traders, qualifying all their antecedents.

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12th February.

THOMSON, *Chief Baron*, this day delivered the opinion of the Court. The questions arising on this motion are, whether the defendant, in such circumstances was, by the Act of the 52d *Geo. III.*, under the necessity of taking a pilot on board his

(*b*) Sec. 44.

vessel;

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vessel; and whether (if he were) the pilot applying for the conduct of the vessel had complied with the provision of that Act, requiring the production of his license. That Act, which would otherwise have repealed the local Act, has, in the 21st section, an express reference to the privileges enjoyed by the port of *Kingston-upon-Hull*, relative to the appointment of sub-commissioners, to examine and license pilots within their jurisdiction. The general Pilot Acts, as well as the *Hull* local Act, which must also form part of our consideration, contain an express provision, excepting from the necessity of taking pilots on board all coasting vessels. And that we think a general exemption, extending to all vessels in the coasting trade; and that it is not to be construed, as it has been contended it should be, to have been restricted by the subsequent words, to such coasting vessels only as navigate the river *Thames* as coasters.

Therefore, without entering into the question, whether the pilot, in this case, should have produced his license,—for our opinion on the other point, renders it unnecessary to do so,—we are clearly of opinion, that this, as being a coasting vessel, was not under the necessity of employing a pilot.

Rule discharged.*

* Notwithstanding the Court discharged the rule on the point of the vessel being not within the Act, as a coaster, the arguments on the question of the necessity of producing the license, on which the nonsuit proceeded, to which nearly the whole of the discussion, on the defendant's part, was directed, are preserved.

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Monday,
12th February.Friday,
10th November.

AGAR v. MORGAN and others.

A separate notice to each of several persons intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an Act of Parliament, which provides, that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants, of such intended action, although none of the other persons, who are afterwards joined in the action, are named in the notice to either of them.

In such an action, a deviation from the line described by the Act of Parliament as the course of an intended canal, does not deprive the defendants of their right to notice, before action brought, on the ground that what has been done by them was not done in pursuance of the Act.

A RULE had been obtained by *Clarke*, calling on the plaintiff to show cause, why the verdict obtained by him at the last *nisi prius* sittings of this Court, should not be set aside, and a nonsuit entered, or new trial granted, on several points of objection; one only of which was finally insisted on:—that the several separate notices of the action about to be brought, which had been given previously to the commencement of the suit, conformably with the directions of the Act of Parliament, were not notices of the joint action which was subsequently proceeded in.

The action was trespass, against the Engineer, the Solicitor, and others, employed by the Regent's Canal Company, for having deviated from the line described in the plan which had been adopted by the Act of Parliament, and deposited with the clerk of the peace, wherein the plaintiff recovered a verdict of 500*l.* damages.

By the 215th section of the Act incorporating the Company, it is enacted, 'that no plaintiff shall recover in any action, for any thing done in pursuance of the Act, unless notice in writing shall have been given to the defendant or defendants, or left at his, her, or their last or usual place of abode fourteen days before such action shall be

commenced,

‘ commenced, of *such intended action*, signed by the
 ‘ attorney for the plaintiff or plaintiffs, specifying the
 ‘ cause of such action ; nor shall the plaintiff or
 ‘ plaintiffs recover in such action, if tender of good
 ‘ and sufficient amends shall have been made to him,
 ‘ her, or them, or to his, her, or their attorney, by or
 ‘ on the behalf of such defendant or defendants,
 ‘ before such action brought.’ The plaintiffs to pay
 treble costs if nonsuited ; and all actions limited
 to six calendar months after the fact committed.

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The notice of action given by the plaintiff was
 delivered at the residence of *each* of the defendants,
 and addressed to *him by name* ; the material part
 of which was as follows :—

‘ I do hereby, as the attorney of and for *William*
 ‘ *Agar*, of *Elm Lodge*, in the parish of *Saint Pan-*
 ‘ *cras*, and county of *Middlesex*, Esquire, give you
 ‘ notice, that at or soon after the expiration of four-
 ‘ teen days from the time of your being served with
 ‘ this notice, or from the time of this notice being
 ‘ left at your place of abode, I shall commence an
 ‘ action against *you*, at the suit of the said *William*
 ‘ *Agar*, and proceed thereupon, according to law,
 ‘ for that,’ &c. (*transcribing the declaration*).

It was objected, at the trial, that as the notice was
 in all respects several, and purported to apprise
 each of the defendants, of a separate action being
 intended to be commenced against him, indivi-
 dually ; and the action brought being joint, in form
 and effect, it could not be maintained, as not being
 the

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the action of which notice had been given : which must tend materially to embarrass the defendants, and render exceedingly difficult, if not wholly impracticable, the object for which it had been provided, the tender of sufficient amends ; and that, therefore, the plaintiff should be nonsuited.

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 10th February.

Dauncey, Scarlett, and Richardson, showed cause. They contended, first, that no notice was necessary in this case, because the trespasses had not been committed by the defendants, acting under the Act, but in violation of it, as they were expressly restricted to the line prescribed, in passing over the plaintiff's land. They were, therefore, acting *colore* and not *virtute officii* ; and in so doing, they were not entitled to the privileges or protection of the Act. In the case of *Alcock v. Andrews (a)*, the defendant, a constable, so acting, was held not to be within the statute. There, Lord *Kenyon* said, the distinction was, between the extent, and the abuse of the authority. But had they kept within the line, and had then done an injury to the plaintiff's house, they would have been entitled to notice. A constable acting in discharge of his duty, is entitled to notice of actions to be brought against him ; but, if acting out of his district, though not wilfully, or *malâ fide*, he loses that protection, as was held in *Blatcher v. Kemp (b)*. So, also, would a constable who should

(a) 2. Esp. 542.

(b) 1. H. Bl. in notis.—*Milton v. Green*, 5 East, 233.
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maliciously arrest *B*, having a warrant against *A*. Now here the defendants have trespassed out of the limits within which they were directed to confine themselves, and have thereby forfeited their right to notice. Nor could there have been any mistake of the plan to be pursued, for it was in evidence, that they followed neither plan ; and the Jury found that they had deviated from both, and that after repeated notice. As to the difficulty of making a tender of amends, the action of trespass is joint, and several ; and each is liable for the trespass of the rest. This action must necessarily have been brought against individuals, because, as a Corporation, the Company could not be sued. Had a tender of amends been accepted, it would have destroyed the plaintiff's right of action ; and acceptance by him of such tender from one, might have been pleaded in bar by the rest ; and if he had received satisfaction from either of the others afterwards, it would have been a fraud, and the money paid would be recoverable by action. Had it not been accepted, then the question would have been, whether the tender was sufficient. This trespass was wilful, and after repeated notice ; and a distinction should be made between the protection and privilege extended to public men, acting officially in public duties, and private individuals, pursuing an object of gain and advantage. In the former case, the construction should be liberal on the part of the defendant ; in the latter, the inclination should be with the plaintiff. Then, as to the sufficiency of the notice given, if the defendants should be held to be entitled to notice. If any difference could arise from joining several together,

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in this action of trespass, it must operate in favour of the defendants, whose advantages are enlarged, and not diminished, by such a mode of proceeding ; were any one of them prejudiced, indeed, by being sued with others, the argument would be entitled to some consideration. The objection would have been obviated, if all the defendants had been named in the addressing part of the notice ; it is, therefore, an objection to the heading only, and merely formal. To try the sufficiency of this notice by analogy, with those which are required to be given by the 24th *Geo. II. ch. 44.* Under that Statute, if a justice of peace should be sued, jointly with a constable, after notice given to him alone, of an action about to be brought against him, the notice having complied with the exigency of the statute, would be good. That statute did not contemplate any distinction between joint and several actions. Had the action, indeed, been joint against four, and the trespass had not been proved against all, that might have afforded a colourable objection ; but as a trespass proved against several, is a trespass in each and every one, the joinder of the defendants cannot be an objection to such an action available to either ; for in actions of trespass, all the defendants are principals, and each is liable for the whole damage proved.

A case was mentioned, from recollection, of an action of trespass against two persons, for sporting on the plaintiff's lands, one of whom had suffered judgment to go by default ; and damages, assessed on a writ of inquiry, had been recovered against him,

him, which the other defendant pleaded in bar, and was held a good plea. It was contended, that the notice which had been given was, in all other respects, most full and explicit, and amply apprised the defendants of the action brought; and it was finally urged, that if the present objection were allowed to prevail, the plaintiff would lose the benefit of the verdict he had obtained, and be left without remedy, inasmuch as he would not now be in time to resume the suit, because the period limited for bringing actions on this Act had expired.

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Clarke and Pollock, F. in support of the rule, contended, that notice was necessary; and that that which had been given was insufficient. On the first point, they took a distinction between acts done in *virtue* of the Statute, and acts done in *pursuance* of it; submitting, that that distinction was recognized by the Act; as in the former case, the remedy given was by the summary intervention of a Jury, to be summoned for that purpose; and the plaintiffs would then have had no right of action: whereas, in the latter, it was by action, wherein, without previous notice, the plaintiffs must be nonsuited on the trial. Nor can the circumstance of the caution given not to deviate, alter the nature of the action, or deprive the defendants of the privileges given by the Act, for any thing done in pursuance of it. Then, as to the sufficiency of the notice.—So strict are the Acts in that respect, that on an action commenced against magistrates, under the 24th *Geo. II.*, although the notice may be, in all respects, sufficiently full, and effectually apprise the defendant of every thing

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necessary to furnish him with the means of defence, yet, if the exact address of the attorney be not endorsed, although his residence be well known to the defendant, the notice would be bad. The substantial objection to the notice, in the present case, is, that it is not a notice of the joint action brought; and, unless a joint action be not distinguishable from a separate one, that objection is valid. Now it would have been clearly fatal, if, after notice of a joint action, they had brought a separate one. There might have been both joint, and several trespasses, committed by each and every one of these defendants, on various occasions, and of greater or less magnitude; and how could they, or either of them, tender amends for a joint trespass, on a notice of an action intended to be commenced for a separate one? They could not confer for that purpose; for, until the declaration was delivered, they could not know the ground of complaint, nor who were to be joined with them. It might happen, too, that an individual might conceive he had a good defence to such an action, and would therefore make no tender; but finding that his witnesses are joined with him in the suit, he then, when his defence is taken away from him, and when it would be too late to avoid expense, might be disposed to tender amends. Had each of these defendants tendered satisfaction amounting to the whole damage, which had been accepted, they would have had no means of recovering the overplus, for the tender would have precluded them. In this case, too, an argument arises from one of the defendants being an attorney, who, if a separate action had been brought against him, might have availed himself of his privilege.

THOMSON,

THOMSON, *Chief Baron*. We are certainly not struck with the answer given to this objection, of want of sufficient notice of the action,—that none was necessary to have been given in this instance; for I incline to think, that the defendants may be said to be acting in pursuance of the Act, although they may have so far deviated from the line of the canal prescribed by it, as to render themselves liable to this action of trespass.

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Then the question which remains to be considered is, whether the notice which has been given is sufficient to found the present action, and has complied with the terms of the Act. (*here his Lordship read the 215th section*) Now, I do not understand this Act as requiring, that notice shall be given of the nature of the action intended to be brought, as to its being joint or several; but of the cause of such action, that is, what it is that is charged to have been irregularly done, in executing the powers of the Act. There is considerable inaccuracy in the expressions used in this section; because there can be no plaintiff before action brought, neither can there be a defendant.

As every trespass is in its nature joint and separate, it seems to me not to be necessary to give notice of a joint action. If it were necessary to give notice to every person intended to be made a defendant in the action, that has been done in this instance; and this notice is, in its terms, fully sufficient to apprise each of them of the cause and ground of the action, so as to enable them to have tendered

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amends; and if any one of them had made a satisfactory tender, whether it had been accepted or not, that might have been insisted on in exoneration of all the rest, when the joint trespass had been proved; just as effectually as a recovery against one, might have been pleaded in bar to the action, with the proper and common averments, that the trespasses alleged to have been committed were one and the same.

I was of that opinion at the trial; and though much research and ingenuity have been employed on the behalf of the objection, in the discussion, I still remain of the same opinion.

GRAHAM, *Baron*, concurred. The notice was certainly necessary; and notwithstanding the difficulties objected by the defendant's counsel, with much ingenuity, but which I think, for the most part, rather imaginary than real, I am of opinion, that that which has been given in this case was sufficient. The view of the Legislature in requiring it, is the true criterion of its sufficiency, which was, that an opportunity might be afforded of tendering amends before action brought. Now there was no danger of the defendant's mistaking the object of this notice, as has been suggested; nor could they have thought that it was an action intended to be brought for individual damages; and, at least, the notice might have set them to make the due inquiries.

WOOD, *Baron*. The two questions here are, 1st, whether any notice was necessary; and 2dly, whether that which has been delivered is sufficient.

On the first, I give no opinion, because I think that the notice is sufficient. In all cases of trespass, the action is joint and several, and the plaintiff is not obliged to confine himself to trespasses committed individually; for the act of one is the act of all, and the act of all is the act of each. Then, the language of this notice is sufficiently explicit; it is, 'I give you notice, that I shall commence an action against you,' and it may mean either alone or with others. As to the danger of the plaintiff's receiving a two-fold satisfaction, one cannot suppose that such a thing could happen from separate tenders; and if they were all to tender satisfaction, the plaintiff would have no right to accept it. A tender by one, if accepted, would be a satisfaction for all; and it is a frequent plea, that the trespass was committed with others, who have made satisfaction. You could not plead the not joining of others, in abatement. Therefore, I think, the notice is good. The same notice has been given to every one of the defendants, and is therefore, in effect, a joint notice, because you might give in evidence, joint trespasses in an action founded on it.

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RICHARDS, *Baron*, of the same opinion. I am materially guided by the consideration, that a constable may be joined in an action against a justice of peace, (who is entitled, under the 24th *Geo. II.*, to notice of the writ and cause of action), although the intention of joining the constable be not expressed in the notice.

Rule discharged.

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Same Day.

25th November.

HOPKINS v. BARNES.

THE question of apportionment of costs between plaintiff and defendant, on the several issues in trespass, *quare clausum fregit*—of not guilty—right of way by prescription,—by grant,—and on new assignment, *extra viam*, on other occasions, and for other purposes—the 1st and 3d issue, and the new assignment (as to slight trespass only) being found for the plaintiff; and the 2d issue, and the other questions on the new assignment, for the defendant,—having been brought fully before the Court, who

AN order had been obtained by *Abbott*, last *Trinity* Term, calling on the plaintiff to show cause, why the master should not review his taxation of the plaintiff's costs, in this cause; and allow the defendant costs for his briefs, witnesses, &c. upon the issues which had been found for him, and deduct them from the amount of the costs which had been allowed to the plaintiff.

The action, which had been tried before a special Jury, at the Summer Assizes at *Gloucester*, in 1806, was trespass, for breaking and entering the plaintiff's close, and damaging the fences. The defendant had pleaded the following several pleas: 1st, not guilty; 2dly, a justification of a right of way, by prescription; and 3dly, a grant of the road. The plaintiff took issue on the plea not guilty, traversed the two special pleas, and new assigned, *extra viam*: on which issue was joined. The Jury found for the plaintiff, on the plea of not guilty; for the defendant, on the first plea of justification; for the plaintiff on the grant of road; and, on the new assignment, for the plaintiff, as to trespass by sheep, with 4*d.* damages, and 4*d.* costs; and for the defendant, on the rest of the new assignment.

took time to consider it: it was decided, that the defendant was only entitled to the disallowance to the plaintiff, of the costs of the issues found for him, (the defendant), and was not entitled, beyond that, to have the costs of those issues deducted from the costs allowed to the plaintiff, which latter object was what was sought by the present motion; and that, although the plaintiff traversed the defendant's plea, of the right of way: the Court considering itself bound by the long established practice of the Court of King's Bench in such cases.

On

1816.

HOPKINS
v.
BARNES.

On the taxation of plaintiff's bill of costs, the master disallowed the plaintiff, costs of the issues found for the defendant, including a rateable proportion of the charges for briefs, fees, and subpoenaing witnesses ; but refused to allow the defendant costs on the issues found for him.

Abbott, on obtaining this rule, had submitted, that as the practice in the other Courts differed, and the question had never been decided here, where it therefore remained doubtful, it was open to him to make the present motion. He urged, also, that as the application had great appearance of reason on its side, arising from an apparent hardship in what was usually done in similar cases, and had been adopted in this; (although that might perhaps be consistent with the practice of the other Courts, at least so far as to justify the Deputy Clerk of the Pleas), this Court might, therefore, think the defendant entitled to the rule, that the question may be brought fairly forward.

The plaintiff, it was observed, had compelled the defendant, by traversing the right of way by prescription, to bring his witnesses to prove his right at the trial; although that might and ought to have been admitted. Therefore, the defendant ought to have the costs of that issue found for him. The verdict, on the second plea, of justification, was found for the plaintiff, merely because it was inconsistent with the former plea. On the new assignment, the plaintiff obtained a verdict, only for a trifling trespass by sheep, but that verdict had no reference to the right of way claimed; and the evidence of the fact was a surprise on the defendant:

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v.
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defendant : but on the rest of the new assignment, the Jury found for the defendant. The main question in the cause certainly was, the right of way, and on that the defendant succeeded. The trespass by sheep was quite collateral. The plaintiff, therefore, was not entitled to judgment on the whole record (a).

There are several cases on the point, in both the other Courts; those in the Common Pleas are in favour of the defendant, while those in the King's Bench are, perhaps, rather the other way. The first case in the Common Pleas, is that of *Brooke v. Willet* (b), where the defendant had pleaded a prescription, for common for twenty sheep, on the *locus in quo*, and common by cause of vicinage. The first issue was found for the plaintiff; the second for the defendant; and it was moved, that the costs of the issue found for the defendant, might be deducted from the costs of that found for the plaintiff, and also from the plaintiff's general costs of the cause, to which the first issue entitled him. And the Court, after taking time, observed, that it not being the settled practice in the King's Bench to confine the statute of 4th *Anne* to the costs of the pleadings in all cases, decided, that, on the words and spirit of the statute, and on principles of justice, the defendant was entitled to the costs of the issue found for him, and not to the costs of the pleadings alone. That case was afterwards confirmed by that of *Vollam v. Simpson* (c). The case of *Martin v. Vallance* (d), and those on

(a) 11 East, 263. (not cited).

(b) 2 H. Bl. 435.

(c) 2 B. and P. 568.

(d) 1 East, 350.

which

which that was founded, will perhaps, be relied on for the plaintiff; but there are distinguishing circumstances in the cases.—No part of the issue on the new assignment was there found for the defendant; and even then, the master had deducted the costs of the issue found for him, and the only reason given for the decision in that motion was, the settled practice. It was moved, in that case, too, that the plaintiff should have no more costs than damages; now all that is sought by the present application is, that the costs of the issue found for the defendant, might be deducted from the costs allowed to the plaintiff, on the issues found for him.

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v.
BARNES.

The COURT having granted a rule to show cause, on what had been thus urged,

Taunton, W. E. and Puller, now showed cause; grounding their opposition to the rule on the long settled practice on such occasions, in the Court of King's Bench, first determined in the case of *Asser v. Finch (e)*, then in *Higgins v. Jennings (f)*, and acted on in all the subsequent cases, down to that of *Martin v. Vallance*, and which are there cited. Those cases are precisely in point, against the present application. Here the master taxed the plaintiff his full costs, deducting the costs of the issue, found for the defendant. The word deducted, there, which has been noticed on the other side,

(e) 2 Lev. 234.

(f) 2 Lord Raym. 1444.

does

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does not imply, that they were deducted from the costs *allowed* the plaintiff, but from the general costs in the cause. Those cases go to establish a rule, that where a plaintiff succeeds on a new assignment, he will be entitled to full costs, though the issue on the defendant's plea of justification may be found for him. It is quite sufficient to entitle the plaintiff to general costs, that, on the trial, he so far succeed as to establish his right to bring the action; and that he does, by obtaining a verdict on any part of the new assignment. Such appears to be the result of the case of *Porter v. Stanway (g)*, where costs were refused to the defendant, on the express ground, that, there having been separate issues joined, and tried, on different parts of the plaintiff's demand, on *one* of which he obtained his success on that issue, that should be considered sufficient to prevail against the defendant's application for costs. (A note of a case of *Cassin v. Hassel* was cited, as an instance in this Court of the same course of taxation having been adopted before.) It is a common practice with pleaders not to plead to a new assignment, and to allow a verdict to be taken against them for nominal damages, which was not done here. The cases which have been cited of the practice of the Common Pleas, in favour of the application, were both cases in replevin, wherein costs are given to the defendant by the statute. There have been many cases in both the other Courts, not depending on the statute of 4th *Anne*, ch. 16, where; there being several counts in a declaration, on one of

(g) 5 East, 261.

which

which only the plaintiff has obtained a verdict, it has been decided, that the defendant shall not have the costs taxed in his favour, on such counts as shall have been found for him. On the whole, the application for this rule being an attempt to found a new practice in this Court, contrary to that established in the others, it ought to be discharged. It might otherwise happen, that a plaintiff succeeding in part, at the trial, might ultimately, by the practice now contended for, have costs to pay to the defendant.

1816.
HOPKINS
v.
BARNES.

Abbott admitted the practice, as to costs on the several counts in a declaration; but contended, that that ought not to be extended. It induced a hardship, and that was a consideration favourable to the present application, against which, this Court had never yet decided, whatever might be the course of taxation adopted by the Master in his office.

[The Deputy Clerk of the Pleas, on being referred to, said, he had followed what he considered as being the usage in the King's Bench.]

This motion does not raise the question, whether the defendant is to be allowed costs at all; that has been done, and what is now prayed is, that the defendant's costs on the issues found for him, may be deducted from the amount of the plaintiff's costs, taxed against the defendant. The damages recovered, were only 4*d.* Yet the defendant does not ask, that the plaintiff may have no more costs than

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HOPKINS
v.
BARNES.

than damages, on that account. The breadth of the road has not been certified to have been brought in question at the trial; nor in fact, was it so.

[WOOD, *Baron*. Suppose the expenses of your witnesses, &c. to prove your issue at the trial, had amounted to a larger sum than has been allowed for the plaintiff's costs, would the plaintiff have had to pay the defendant extra costs?]

We should, in that case, have asked only for so much as would have balanced the plaintiff's costs. But it would be no answer to such an application as this, if well founded, that a defendant should not have his costs to the amount of those taxed for the plaintiff, as far as they might go, because the costs, as taxed for him, (the defendant), amounted to a greater sum.

The cases in the Common Pleas cited for the defendant, were, it is true, cases of replevin; but the Court did not proceed wholly on the statute, as appears by the case. And the cases quoted for the plaintiff have all been decided on the principle, that costs ought to be commensurate with success, and that is all that is applied for by the present motion; but whatever may be said to be the practice elsewhere, if there be justice in this application, this Court may, without regard to the usage of the other Courts, (especially where they are not uniform), make this rule absolute.

The COURT, intimating that they thought the reason of the case in favour of the defendant's application,

application, ordered the rule to stand over; directing inquiries to be made, in the mean time, as to the course of practice adopted in such cases by the other Courts.

1816.

HOPKINS
v.
BARNES.

The Master having now reported, that the taxation which had been already adopted by him, consisted with the practice of the Court of King's Bench; it was therefore ordered, that the rule should be discharged.

Monday,
12th February.

Rule discharged.

— v. —

AN application was made for a rule to show cause, in a matter now pending, but the Court refused to hear the motion; for they said, that they would not grant such a rule on the last day of the Term, as it must operate to stay proceedings.

Same Day.

The Court will not, generally, grant a rule to show cause, on the last day of term, where it would operate to stay proceedings. [But see the next case.]

M'PHEDRON v. FITHERINGTON.

DAUNCEY applied for a rule to show cause, why the proceedings on the bail-bond, assigned in this cause, should not be set aside, and be stayed in the mean time. In consequence of what fell from the Court, in the preceding case, he stated,

Same Day.

bail-bond assigned, if the motion could not have been made before.

An order will be granted, although applied for on the last day of Term, to set aside and stay the proceedings on a

that

1816.
 M'PHEDRON
 v.
 FITHERING-
 TON.

that the application could not have been made before this day. The motion was founded on the fact of the bail having justified before the assignment of the bail-bond; and the Court granted the motion.

PARNELL v. NESBITT.

Same Day.

The Court will grant an injunction to stay proceedings at law, before answer, even where the defendant having obtained time for the return of a Commission sent abroad to take the answer, is not in contempt for not putting it in, if it is shown that, in consequence of the necessary intermediate delay, the action at law would be tried before the expiration of the time allowed for its return.

THE plaintiff (an orange-merchant) had agreed to purchase of the defendant, (a planter of fruit for exportation, residing in the island of *St. Michael's*), 2,000 boxes of oranges, at market-price; and, in consequence, a cargo of 850 boxes were sent from thence to *London*, consigned to the plaintiff.

On receipt of the invoice, the plaintiff found that the defendant had charged for the said cargo at the rate of 24*s.* per box; the current price in the island, at that time, being, as the plaintiff stated, only 15*s.* a box; and he, therefore, refused to accept the defendant's bill on him for the amount, (1,020*l.*), of which he gave notice to the defendant's agents in *London*, whom he requested to take the cargo, tendering them the bill of lading. They having refused either to receive the oranges or reduce the price, the plaintiff gave them notice, that he would take the oranges, to prevent their total loss, without prejudice.

In

In the mean time, the defendant brought an action at law, to recover the amount so charged by him for the cargo ; to which the plaintiff pleaded, and afterwards filed a bill in this Court, to restrain further proceedings in the action, and for a discovery, and general relief. To that bill the defendant had appeared ; and had obtained an order, for a commission to go out to *St. Michael's* to take his answer, with three months time allowed for its return.

1816.

 PARNELL
v.
NESSITT.

Stephens now moved, on an affidavit of the above facts, for an injunction. He stated, that the defendant having obtained an allowance of three months time for the return of the commission, the suit at law which was pending would come on, in course, in the mean time ; and, therefore, unless the plaintiff should obtain the order for an injunction, now applied for, the object of his bill would be frustrated, and the plaintiff would then, perhaps, be placed in the disadvantageous situation of having a verdict found against him, in the mean time, greatly to the prejudice of his suit in this Court.

The plaintiff was not in contempt for want of answer, because the order had extended the time usually allowed for putting it in, which had deprived the plaintiff of the usual ground for the present motion.

The COURT said, that this was certainly a case altogether new ; but they thought the application

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founded

1816.
PARNELL
v.
NEBITT.

founded on good reason, and therefore, (the bill praying relief, and there having been an affidavit of merits filed), they ordered the injunction.

Motion granted.

THE END OF HILARY TERM.

ERRATA.

Page 3, line 17, *dele* that

4, line 14, *dele* against

5, line 5, (from the bottom), *dele* —

12, line 7, *for* defendant, *read* deponent

21, line 1, *dele* comma

43, line 4, (from the bottom), *between* was and personal
insert a

48, note, *dele* the text

103, line 10, *dele* or not

103, line 4, (from the bottom), *for* Acts *read* Act

In pages 105 and 107, correct the letters of reference

Page 118, line 16, *between* 34 and that, *insert* whereby it is
enacted



REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

SITTINGS AFTER HILARY TERM,—56 GEO. III.

GRAY'S-INN HALL.

GRAVES v. HOULDITCH and others.

1816.
Monday,
26th February.

THE facts on which the present motion, for an injunction to stay proceedings at law, was founded, as disclosed by the bill, (which had been filed for a discovery), were, that Captain *Wallace*, having won a sum of money at play, from a gentleman of the name of *Neville*, drew a bill on him for 500*l.*, and prevailed on the plaintiff to endorse it. *Wallace* afterwards paid it to *Houlditch* and Co., who sued the plaintiff on the bill, but failed in the action, which was in the Court of

An injunction will not be granted to restrain a defendant from taking out execution on a judgment being suffered by default, on a case made by bill, and answer that the bill of exchange on which the action had been brought, was given in consideration of defendant's delivering up a former bill, which had been endorsed in consideration of a gaming debt.

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King's

1816.

GRAVES

v.

HOULDITCH
and others.

King's Bench, on the defence, that it had been accepted in consideration of a gambling debt ;—that, afterwards, the plaintiff accepted another bill, in favour of the defendants, on their undertaking to give up the former one for the same sum and interest, and for no other consideration. The answer admitted the material facts of the bill ; and alleged, that *Wallace* having become indebted to defendants, in their business as coachmakers, paid them the first bill, which they believed to be endorsed without consideration ; and that, after their failure in the action, the plaintiff expressed his regret that it had not been paid, as he owed *Wallace* money, and accepted the second bill, for 565*l.* 13*s.* 6*d.*, drawn by the defendants for the said Captain *Wallace*, and that the first was destroyed ; but denied that it was given in lieu of the former bill, or that they knew whether plaintiff ever received any consideration for accepting that bill ; and alleged, that they had commenced an action, and had recovered judgment.

Under these circumstances, *Martin* moved for an injunction to restrain the defendants from suing out execution ; but

The COURT were of opinion, that, but for judgment having been suffered by default, (as was the case), the plaintiff would have had the same defence at law on this, as on the other bill ; and that, therefore, he had now no equity.

Motion refused ; but no costs given.

1816.

PARNELL v. NESBITT.

Friday,
27th February.

DAUNCEY moved, on the part of the defendant, that the plaintiff might be ordered to bring into Court the sum of 1,020*l.*, in the pleadings mentioned, or such other sum as the Court should think proper, in trust, in this cause.

This was the cause in which a motion had been made, last *Hilary* Term, for an injunction (*a*); and the circumstances under which this application was made, are stated in the report of that motion.

It was submitted, that as the plaintiff had taken the fruit, and had obtained an injunction, which would prevent the defendant from recovering the value, whatever that might be, for some time, at least, he ought to pay into Court, for the security of the defendant, the sum charged for the goods; or, if the Court should think that sum too much to ask for, under the circumstances, that the defendant should be ordered to pay into Court, the money which he had himself, by his bill, admitted the goods to be worth, and which he had offered to pay for the cargo.

Stephens opposed the application. He insisted, that an order for paying money into Court, on having obtained an injunction, was never granted but in cases where the sum proceeded for, had been found to be due by a verdict at law. If, when the injunction is dissolved, and the action tried, the

The Court will not order a plaintiff, who has obtained an injunction to stay proceedings at law, on a bill filed for a discovery, by which he seeks to establish a case of the goods being charged at a much greater price than the one agreed on,—to pay even the price acknowledged to be just, into Court, to abide the result of the action.

(*a*) Vide ante, p. 144.

1816.
 PARNELL
 v.
 NESBITT.

plaintiff at law should recover, the plaintiff in equity will be obliged to satisfy that verdict, before he can take the money out of Court again, if the Court should not then be sitting; so that he would, in that case, have to pay it twice over. His original engagement, too, was to pay by a bill at sixty days; it would, therefore, be altering the nature of the contract. In this case, the plaintiff has only taken the goods with a view to prevent their irreparable loss to all parties, and that with a protest against being bound by that act; and if the defendant recover in the action, it will only be the amount of the clear produce of the sale of the fruit.

Dauncey. The admission of the smaller sum being due, and the offer to pay so much, the plaintiff having possession of the goods, places the defendant in the same situation as if he had recovered a verdict at law, when it is admitted he would have been obliged to have paid the money into Court; and the inconveniences now complained of are no more than he would have been put to in that case.

[RICHARDS, *Baron.* Does a Court of Equity ever, where it is not made one of the terms which induce the Court to assist him, order the plaintiff to pay money into Court? The plaintiff may alter his case to-morrow.]

[GRAHAM, *Baron.* The plaintiff is *rectus in Curia*, and seeks nothing of the Court.]

Per Curiam.

Motion refused, with Costs.

The

1816.

The KING v. MARES.

On Extent in aid of *Gardner*.Thursday,
29th February.Saturday,
3d February.

OWEN had this day obtained a rule to show cause, why the extent issued in this case, and all the proceedings thereon, should not be set aside, with costs; and that, in the mean time, all further proceedings should be stayed. It was moved, on the ground that the prosecutor of the extent was a person not in a situation to employ the prerogative process in his behalf, according to his own description of himself, in his affidavit to ground the extent; which stated merely, that he being a *brewer*, was indebted to his Majesty in the sum of 900*l.* for excise duties, payable in respect of *beer* made between the 23d day of *August* then last and the 16th *November*. That *Joseph Mares*, of *Stow-in-the-Wold*, in the county of *Gloucester*, was indebted to deponent in the sum of 222*l.* 9*s.* 6*d.*, the balance of accounts for goods sold and delivered at various times, between the 18th *May* then last and 1st *November* then instant; that said debt was *bonâ fide* due to him, and not in trust, and had not been sued for in any other Court; and that, unless a more speedy method than the ordinary course of proceedings be had

Creditors of a defendant in extent in aid, have not such an interest in the property as to entitle them to move to set it aside for their benefit, though joined in the application by the defendant, *sed qu.* if they had obtained judgment.

An extent in aid against the body of a defendant, may be issued, although not applied for in open Court.

A rule obtained to set aside an extent in aid, should, in all cases, be served on the Crown officers of the department of the

Revenue, to which the prosecutor of the extent is indebted, to give them an opportunity of coming before the Court.

If a party, proceeding by extent in aid, on such a debt due to the Crown as does not authorize that process, be at the same time really a debtor by bond also, that does not operate to remove the objection.

An extent will not be set aside for irregularity, unless the person objecting apply before the sale, under a *conditio expensis* of the effects which have been levied.

The rule to claim is not, *per se*, notice of the intended sale.

1816.
 The KING
 v.
 MARES.

against said *J. M.* to recover, &c. the same would be in danger of being lost, whereby, &c. From that affidavit it appeared, that the prosecutor was only indebted to the Crown in a manner in common with almost every other subject, and not in any special character, as Collector or Receiver of the Revenue, or otherwise entitling him to this Crown process.

Affidavits of the defendant, and of *George Banaster*, one of his principal creditors, were also put in. The defendant's affidavit stated the issuing of the extent against his *body*, lands, and tenements, goods and chattels, and that the Sheriff of the county of *Gloucester* had put his bailiff in possession of the defendant's goods and chattels, for the debt; that it was due for beer sold to defendant only, and not for any debt due to his Majesty; and that he was indebted to *Vernon and Banaster*, of *Tewkesbury*, wine merchants, in the sum of 104*l.* 17*s.* 3*d.*, for wine bought of them long before the issuing of the extent. The affidavit of *Banaster* confirmed the last statement, and that their debt remained unpaid and unsecured; and proceeded to state, that *Mares*, having declared himself to him to be in a state of insolvency, applied to him to prevail on the rest of his creditors to accept a composition; that deponent had applied by letter to *Gardner*, amongst the rest, stating the circumstances and proposal, and requesting that he would accede to it; but that he, without noticing that letter, sued out the extent, in consequence of such communication; and added, that, unless the Court should interfere on
 S the

the behalf of deponent and the other creditors, the whole of the defendant's property, or nearly, would be exclusively applied to the satisfaction of *Gardner's* debt, to their injury.

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The KING
v.
MARRS.

Under the circumstances, as disclosed by these affidavits, it was submitted, that there were two other grounds for the interference of the Court in this case. One was, that this being an extent in aid against the body of the defendant*, could not, according to the rule, be issued, unless by special order, made on application in open Court.

That objection the Court over-ruled; saying, that it had become the customary and common course so to issue the extent, as it had been issued in the present instance; and that it was now the usual practice, authorized by the discretionary powers vested in the Court by the statute 33d *Hen. VIII.* ch. 39, whatever might formerly have been the rule†.

The other ground was, that there had been a breach of faith on the part of the prosecutor, in so abusing the communication made by *Banaster*, with a view to the adoption of measures for the common benefit of the defendant's creditors at large.

The Court granted a rule to show cause; observing, that the question would be, whether *Gardner*

* The Register stated, that in many cases the capias clause of the writ was omitted.

† Vide *Rex v. Mowbray*, ante, p. 13.

1816. was to be driven back to the proceeding by *scire*
 The KING *facias*, or had become entitled to this extraordinary
 v. process, by means of the extent having procured
 MARES. his simple contract debt to be converted into a
 debt of record.

Tuesday,
 27th February.

Dauncey now showed cause ; which, he observed at the commencement, he did not do on the part of the officers of any department of the Revenue, but solely on behalf of the party suing the extent. The Court, on a former but recent and similar occasion, having directed, that notice of the rule which had been then granted, should be given to the solicitors of taxes, in this case the excise should have been served.

[*Chief Baron.* The Crown should have notice, on all occasions, of intended discussion relating to extents. They are properly, and in fact, suits on behalf of the Crown, which has an interest in the process in every instance.]

Dauncey then insisted, that the rule ought to be discharged, with costs, as being unduly obtained, the defendant, in this instance, having been negligent of his right, if he had any, in not having entered any claim. The present application had been made, after an actual sale, under a writ of *venditioni exponas*, in which case there had never been an instance of interference by the Court. That alone, he contended, was a complete answer to the present rule. The defendant had therefore been guilty of gross laches. The extent was returnable on
 the

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The KING
v.
MARRS.

the 28th of *November*,—the rule to claim expired on the 7th of *January*,—the *venditioni exponas* issued on the 8th, and was returnable on the 23d; whereas the affidavit on which the rule had been applied for, was sworn on the 27th of *January*, and the application made only on the 3d of *February*, two months after the inquisition; yet now, after having so long lain by, they required that the extent, and all the proceedings thereon, should be set aside for irregularity, and that with costs.

[To questions put by the Court, as to what had become of the money levied, and whether notice of the sale had been given to the defendant, it was answered by the register, that the money arising from the sale remained in the hands of the Sheriff; and that the rule to claim, bore date on the return of the extent: but they determined that the rule was not, *per se*, notice of the intended sale.]

Affidavits of *Gardner*, and the officer who made the levy, were then read; by which it appeared, that *Gardner* had actually given a bond to the Crown, long previous to the inquisition, which was still in force; but it appearing to be for *malt* duties, the Court held, that it was out of the present case, as the prosecutor had not proceeded on it. As to the breach of faith, as the proposal in the letter had not been acceded to, there was none; and an unanswered letter of such import, ought not to operate to defeat a party of his right to use this prerogative process.

Owen, in support of the rule, relied on his original objection, of the party proceeding on it, in
this

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The KING
v.
MARES.

this instance, not being entitled to the Crown process. He explained the apparent tardiness of the application, by stating, that the affidavits sent up to found the motion, had been originally sworn in *November*; but that having been wrongly intitled, by being expressed to be in a cause of *Gardner v. Mares*, they were returned to be re-sworn, and that, under those circumstances, the 3d of *February* had been the earliest opportunity; that, as to the *venditioni exponas* having issued before the application was made, if the writ of extent had been in the first instance improperly issued, that, and all subsequent proceedings, would of course fall with it. The Crown possibly might have had a right to proceed for the recovery of this debt, but it was not necessary to discuss that point on the occasion of the present motion.

In the mean time, notice was directed to be given to the Crown officers, that they might attend if they thought proper.

29th February.

The COURT (having been apprised that the officers of the Crown had declined interfering), adjudged, that the application, if there were any ground for it, had been made too late. And they added, that there was a preliminary objection to the motion, which was conclusive,—that the application was made by and on behalf of creditors who had not obtained judgment, or shown that this proceeding had defeated their right of execution.

Rule discharged, with Costs.

The KING (in aid of RICKETTS) v. SLY.

Thursday,
30th February.

IT had been moved, by *Fonblanque*, on behalf of the assignees of the defendant, that the prosecutor of this extent should show cause why the extent (commission) to find debts, should not be set aside, and the inquisition taken thereon quashed; and why the extent, and all proceedings founded on it, should not be set aside, with costs.

The surety in a bond to the Crown by a maltster, for securing the payment of duties on malt made by him, is not such a debtor to the Crown as is entitled to prosecute an extent in aid; because, by the special condition of such bonds, the duties are not payable till four months after the maltster shall have made entry, according to the 48th Geo. III. ch. 74, § 23.

The process had been issued in behalf of *Ricketts*, who had, with another person, (as sureties), entered into a bond to the Crown, in the penalty of 1,000*l.*, conditioned, that the principal, *Daniel Cripps*, (a maltster), should pay the duties of excise on malt made by him in his business.

It is not necessary that the bond on which the inquisition proceeds, should be actually produced.

The inquisition found, that the defendant, *Sly*, was indebted to *Ricketts*, by bond of the 8th May 1815, in 600*l.*

The process of Extent, issues of common right, if well founded.

The affidavit of *Ricketts*, on which the commission issued, stated that he, together with two others, had, by bond dated 7th December last, become jointly and severally bound to his Majesty in 1,000*l.*, payable at a day past, conditioned, for the payment of duty on malt made by *John Cripps*, which bond remains in force, and undischarged; that *Sly* was indebted on bond to him (*Ricketts*) in 300*l.*; that said *Sly* was greatly in debt, and much decayed in his credit, and embarrassed

1816. rassed in his circumstances, with the usual suggestion of the necessity of the process. There were counter affidavits filed of the solvency of *John Cripps*, and that the debt due to the Crown was less than that due to the pursuer of the extent; but those objections were disposed of by citing the cases of *The King v. Blatchford (a)*, and *Rex v. Bunney (b)*.

9th February.

The application was made on the part of the assignees of the defendant, who were considerable creditors, and had taken out a commission against him, under which he had been declared bankrupt, on the ground, that the rule of Court (c), which requires the production of the bond, had not been complied with; and that no *existing debt* was due to the Crown from the prosecutor of the extent, at the time of the teste of the process, as would (it was said) have appeared by the bond, if it had been produced in conformity with the rule, the condition not having been broken.

The Court granted an order to show cause; directing, at the same time, that it should be served on the officer of the Crown.

30th February.

This day the Solicitor General attended, on the part of the Crown, and stated, that the Crown would, in all cases, oppose an extent in aid, where the object of it was the private advantage of an individual merely, unconnected with the public interest. The extent in question, he submitted, had

(a) 1. Anstr. 162.

(b) 1. Price, 394.

(c) 14th Nov. 1691.

been

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been issued, without observing the formality required by an express rule of Court, of producing the bond on which it was founded, at the time of applying for the process. That rule had been made for the best purposes, with a view to give the officers of the Crown, with whom such bonds were deposited, a controlling power and discretion, as to the right and propriety of permitting the process to issue: for the bond, being in their custody, could only be by them produced, unless it were surreptitiously obtained. The bond, in this instance, does not appear, by the fiat, or any other of the proceedings, to have been produced; and, therefore, the fiat may now be properly revoked, and the subsequent proceedings set aside. In this case, too, the affidavit, dated 26th *December*, states, that *Ricketts* entered into the bond to the Crown on the 4th of the same month. Now that bond is founded on the 48th *Geo. III.*, ch. 74, sect. 23 (*d*);
by

(*d*) Whereas the above bounden (*the principal*) hath become and is a maltster and maker of malt for sale; and the above bounden (*the sureties*), as his sureties, have agreed to become bound in the above penal sum, being double the value of the duties which the person employed by the Commissioners of Excise for that purpose, hath judged likely to arise, be charged on, and become due from the said maltster or maker of malt, within five months, for the due payment, at the end of every four months, from and after the day on which the above bounden, &c. so being such maltster and maker of malt, as aforesaid, shall or ought to have made such entry, as in the statute in that case made and provided is mentioned, of all the malt by him made, of all such sum and sums of money as shall arise, or be charged on and become due from the said maltster and maker of malt. Now the condition of this obligation is such,

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by referring to the condition of which, it will be seen that no duties could be, at the time of the date of the affidavit, payable to the Crown; for the surety could not be called on to pay the penalty till the expiration of four months after entry ought to have been made by the maltster, according to the provision of the statute. The Crown itself, therefore, could not have sued out a *scire facias* on this bond against the surety, until the expiration of that time; for not before, could a breach of the bond be alleged as against *Ricketts*. He concluded by submitting, that whatever right the subject might have to sue in general, without the interference of the Court, that, in the case of extents in aid, the Court might exercise a controlling power, and should not permit the process to be used as a matter of mere right; but that they ought, whenever they should be satisfied that there was no proper foundation for it, either to refuse it in the first instance, or subsequently to set it aside; and that, as this was a case of an unauthorized use of it, all the proceedings should be superseded.

Dauncey, and *Wingfield*, in support of the extent, contended, that, as the law at present stood,

such, that if the above bounden, (*principal*) do and shall make due payment at the end of every four months, from and after the day on which the said, &c. shall or ought to have made such entry, as in the statute in that case made and provided is mentioned, of all the malt by him made, of all such sum and sums of money as shall arise, or be charged on and become due from the said maltster and maker of malt, then this obligation to be void, or else to be and remain in full force and virtue.

the

the prosecutor of this extent had a right to issue the process, in the first instance, and was, therefore, now entitled to proceed on it; that he had given a bond to the Crown, had not been denied, and it has been decided, that that was sufficient to support an extent in aid. The *King v. Mainwaring (e)* is an authority that, in case of a bond given to the Crown, the condition need not be broken. Then it is objected, that the rule of Court has not been complied with, by the production of the bond. Now it not only does not appear, and is therefore only assumed, that the bond was not produced, but the inquisition finds, that the defendant was indebted to the prosecutor by bond, so that it appears, that it must either have been produced, or shown to have been in existence and force.

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[THOMSON, *Chief Baron*. The inquisition certainly alludes to the bond; and it is stated to be the foundation of the debt. The affidavit states, that the bond was not lodged in the Remembrancer's office, nor produced to the Sheriff on the inquisition, nor to the Baron who granted the fiat.]

[The Solicitor to the Excise, explained the customary course to be, that the bond is obtained from the collector, (in whose custody it usually is,) and produced, when it is returned to him again.]

Our proposition is, that the production of the bond was not necessary; it was sufficient to prove its existence, and that it was unsatisfied, which must now be taken to have been done. It is said,

(e) *Price's Exch. Rep.* vol. I. p. 202.

that,

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that, if it had been produced, it would have appeared that nothing was then due on it ; that, we contend, is no objection, for the bond being a debt of record, binds immediately ; nor is it necessary the condition should be broken ; those points are established by the case cited. Another answer to the objection is, that a necessity of actually producing the bond, would often deprive the person entitled to the process, of the advantage of it. It might be refused by the collector without good reason, of which he ought not to be made the judge ; and the gist of this proceeding consists in its expedition. It was said by *Eyre*, Chief Baron, in *Rex v. Blatchford (d)*, that the Crown's debtor has a right to this priority ; and the Court cannot refuse to let the extent go. Such objections as these are rather matter of pleading ; they go to traverse the inquisition. As to the prosecutor not being entitled to proceed on the bond till four months after the forfeiture, it cannot be supposed that the Legislature intended to delay the Crown's pre-existing right to issue extents *instante*.

THOMSON, *Chief Baron*. The sole point here is, whether a person, debtor to the Crown as surety in a bond, the period not having arrived at which he could be called on to pay, if the condition had been broken, is such a debtor to the Crown as to be considered entitled to the Crown process. That is the single question ; and the Court may confine itself to the inquiry, whether there was such a debt due from *Ricketts* to the Crown, at the time of issuing this extent, as warranted the fiat. The affidavit on which it was obtained, was sworn on the 29th of

(d) 1 Anstr. 162.

December

December 1815, setting forth the bond by which the prosecutor was supposed to be constituted a debtor to the Crown. That bond is dated on the 7th of *December*; so that advantage is very soon taken of it, supposing he might do so. The affidavit does not disclose the condition of the bond, nor is it usual, in such affidavits; but it is stated, as was necessary, to be a bond given pursuant to, and under the statute, and we may fairly take it, that such was the bond so given in this instance. That bond would not have become payable till four months after the condition should be broken. (*Here his Lordship read the condition, as set out in the note in pages 159 and 160.*) Now the Crown could not, at that time, have proceeded on the bond against the surety. Then can it be said that *Ricketts* shall be considered as in a better situation than the Crown? The defendant, on a *scire facias*, would have been entitled to *oyer*, and, on the bond being set out, it would have appeared that the time was not yet arrived when the money was payable; and therefore, the Crown could not have recovered. How, then, could *Ricketts*? That is the broad line, in this case; without noticing the other arguments which have been pressed, it is sufficient for setting aside the proceedings on this extent, that there was not, at the time when it was sued out, a debt due to the Crown, from the person at whose instance it was issued, so as to entitle him to make use of the Crown process.

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GRAHAM, *Baron*. I am not prepared to say, whether persons in the situation of the prosecutor

1816. of this extent, would not have a right to the process generally ; but the question here is, whether, at the time that the extent was issued, there was such a debt due from him to the Crown, as entitled him so to proceed. If he had had a right to the extent, I think he should have been permitted to sue it out without previous application to the officers of the Crown in the particular department. This was a debt due on bond, and it might be a prudent rule that he ought, on occasion of applying for an extent, to have produced it, yet that might sometimes go to defeat the efficacy of the proceeding ; and, in practice, there are many instances where parties have been permitted to have extents, where they have been unable actually to produce the bond. I do not mean to say, that, in this case, the extent ought to be set aside, on the ground that the party applying for it did not, at the time, produce his bond. But every person sued has a right to come forward, to show that the party suing the extent had no privilege to use it. In this case that is shown conclusively. The condition of these bonds is, that the surety shall not be affected by it till four months after forfeiture. Independent of the bond, *Cripps* might have been liable to an immediate extent ; but that does not affect *Ricketts*. As to the bond not being a procrastination of the remedy, I lay that aside. The surety could not have been entitled to proceed under it till he had actually become liable to pay the debt. We were pressed with the case of *The King v. Mainwaring* ; but there is a wide distinction between the cases, arising from the peculiar condition of this bond.

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That does not, it is true, specifically appear ; but it is incumbent on the party making the application, to show that the objections which have been taken to it do not stand in his way.

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WOOD, *Baron*. I think that the extent, in this case, has been improperly issued. It is an abuse of the process, when it is used by a party not indebted to the Crown. In this case, *Ricketts* was not indebted to the Crown ; he was merely a surety for a person who might have become indebted to the Crown for duties ; and those duties not becoming payable till after a certain period, no action or proceeding by extent could have been instituted against him as surety before that period by the Crown ; and had *Oyer* been prayed of the bond, on such an occasion, it would have appeared, that the duties were not then payable. The prosecutor of this extent is in a very different situation from the maltster himself. This proceeding being, therefore, an abuse of the Crown process, ought to be set aside.

RICHARDS, *Baron*. I am of the same opinion. *Ricketts* was only liable to be called on by the Crown, under this bond, on a forfeiture by the principal. The principal obligor could not have been proceeded against by the Crown under the bond, at the time of this extent. It follows, of course, that the surety could not. He would, if permitted to use this process, be in a better situation than the Crown.

Order made absolute.

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11th February.

THE ATTORNEY GENERAL v. LARAGOTTY.

A defendant, in an information for breach of the Navigation Laws, is not entitled to a Commission to examine witnesses abroad, *en motion* made to this Court under the 13th and 14th Ch. 2d, pending the progress of the proceedings under the information.

Nor will the Court grant an order to restore a vessel seized on such charges, where a question of identity may be raised on the trial of the cause, although the defendant offer approved security for re-delivering her if a verdict should be recovered against him, p. 172.

Those different objects cannot be blended in one motion, p. 168.

THE present motion arose out of the seizure of the ship *San Juan Baptista*, by the officers of the Customs, charged with having been found armed for resistance, contrary to the statute, whilst belonging wholly or in part to a *British* subject, and with various other breaches of the Navigation Laws, some of which were laid to have been committed previously, and others subsequently, to the alleged transfer of her to the foreign subject who was the present claimant, under a purchase from the late *British* proprietor.

In *Michaelmas* Term 1814, an information was filed against the plaintiff by his Majesty's Attorney General, in the regular course, as the first step in proceeding to the condemnation of the vessel. It consisted of four counts.—The first was founded on the 24th *Geo.* III. ch. 47, sec. 4, charging that the ship, whilst belonging wholly or in part to his Majesty's subjects, between the 1st *December* 1811, and the day of exhibiting, &c. within four leagues of the coast of this kingdom, to wit, &c. was then and there armed for resistance, and had on board more arms, &c. than, &c. (sec. 5.) not being licensed, &c. (sec. 7.) that is to say, having on board, &c. contrary to the form, &c. by reason whereof the said ship or vessel became forfeited, according, &c.—The second count proceeded on the 47th *Geo.* III. ch. 66, sec. 5, for "being found
" in

“ in a part of the *British* channel, having on board,
 “ and being navigated by, a greater number of men,
 “ officers and boys included, than her proportion,
 “ according to her tonnage,” contrary, &c.—The
 third count was on the same statute, for being discovered in a part of the *British* channel, having on board, and being navigated by, a greater number of men, officers and boys included, than her due proportion of eleven, the said ship being of the burthen of 168 tons. And the fourth was on the 33d *Geo. III.* ch. 2, reciting his Majesty’s proclamation or order in council of 17th *July* 1812, prohibiting the exportation of arms or ammunition, without permission of his Majesty or his privy council, according to the 29th *Geo. II.*; and charged the lading of arms and ammunition on board the said ship, by certain persons unknown, for the purpose of exportation, without such permission, &c. contrary, &c. wherefore, &c. The defendant pleaded the general issue, and notice of trial had been given for the then ensuing *Hilary* sittings.

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Campbell now moved, (the Attorney-General having countermanded his notice of trial, to afford an opportunity for this motion), to postpone the trial, on the ground of the permanent absence of material witnesses resident in *Spain*, and for a Commission to examine such witnesses; and also, that the vessel might, in the mean time, be liberated, and restored to the claimant, so as to be enabled to pursue her voyage, on her owners entering into sufficient recognizances, to be approved of by the Attorney-General, for her being again delivered up

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to the Customs, in the event of a verdict being found for the Crown. The Court intimated, that the different objects of the application now made, should, in point of form, have been the subject of separate motions. The application was then confined to the postponement of the trial, and that a Commission might be issued in the mean time, to examine the defendant's witnesses residing abroad. The case of *Jenkins* (qui tam) v. *Larwood* (a), was much pressed on the Court, as an authority in point. There a similar motion was made, founded on the 29th section of the 13th and 14th Ch. II. ch. 11*; and it was urged, that though the jurisdiction seemed to be given to the Court of Chancery alone, yet, as a remedial law, and though it mentions only one instance, it should extend to others within the same equity. Lord Chief Baron *Bury*, and Baron *Price*, were of opinion, that such Commission should go, not on the Act, but by virtue of the original jurisdiction; Baron *Fortescue* *Aland* thought it might go, even upon the statute;

(a) *Bunb.* 13.

* "That in case the seizure or information shall be made upon any clause or thing contained in the late Act, intituled, *An Act for the encouraging and increasing of Shipping and Navigation*, that then the defendant or defendants shall on his or their request, have a Commission out of the high Court of Chancery to examine witnesses beyond the seas, and have a competent time allowed for the return thereof before any trial shall be had upon the case, according to the distance of place where such commission or commissions are to be executed, and that the examination of witnesses so returned shall be admitted for evidence in law at the trial, as if it had been given *vis et voce* by the examine in Court; any law, statute, or usage to the contrary in any wise notwithstanding."

Baron

Baron *Montague* dissenting in both. Between subjects, in an action of trover, such a motion would be almost of course; the only question in this case was, whether, against the Attorney General, it would be granted.

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THOMSON, *Chief Baron*. This is a case of great novelty and importance, and demands much consideration. There can be no harm in granting the rule, which we will do without giving any intimation of our opinion. Diligent search should, in the mean time, be made in the office, for precedents. I fear we shall not be able to decide it this term.

The COURT, therefore, granted a rule to show cause; which

Dauncey now opposed. He objected, on the part of the Crown, to the principle of the motion altogether; for that, if this singular, and as yet unprecedented attempt, should succeed, similar applications might and would be made, in every case of information, against persons charged with any species of the offence of smuggling, which would, in all cases, greatly embarrass and protract the proceedings of the Crown officers in enforcing the revenue laws. He contended, that, as the provision of the 13th and 14th *Ch. II.* (whereby the Legislature had interposed to give defendants, in informations founded on the Navigation Act, a right to apply specially to the Court of Chancery, for Commissions to examine witnesses abroad,) was introduced expressly to afford that privilege, it was obvious that such a right could not have previously existed; and that, as an express enactment had been

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found necessary to confer that right, in those instances, so must it be equally necessary in all other cases of proceeding to forfeiture under subsequent Acts, and in no one of them had such clause been introduced. It must therefore be confined to proceedings instituted for offences against that Act alone, and be considered as operating to exclude the privilege in all other cases. The practice of the Court furnishes the law, and no case has been cited in favour of the motion, except the one from *Bunbury*, which was a motion made on the Navigation Act; and in this information the charges are founded on offences against other Acts. The only mode of obtaining the indulgence sought, is by consent of the Crown, which, in such a case as the present, would not be likely to be granted. It was also objected, that the names of the witnesses intended to be examined, were not stated in the affidavit*, nor the points to which they were to be interrogated; and that the affidavit on which it was moved was not positive, but merely stated the deponent's belief, that there were witnesses abroad whose testimony was necessary to the defence.

Campbell, in support of the rule, called the attention of the Court to the new and peculiar circumstances of this case; the defence being, that the defendant, a *Spanish* subject, had become the *bonâ fide* owner of the vessel seized, having purchased it of a *Spanish* merchant, to whom it had been previously sold by the *British* proprietor. It would be in evidence that the vessel was armed, manned, and documented as a *Spanish* privateer, and cruized under

* The substance of the affidavit is given in p. 176.

Spanish

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Spanish colours. The case would be, therefore, a mere question of property and flag, and would materially depend on the proof of a legal transfer having been effected, which could not be done without the testimony of the witnesses proposed to be examined on the part of the defendant. Nor, if the present rule should be granted, would it afford a precedent for similar applications in informations of smuggling, for there could be no sort of analogy between such cases and the present, which was distinguished from those, by the circumstance of the defendant being a foreign subject, claiming exemption from penalties inflicted by the *British* Legislature. It was denied, that it was necessary to set forth the names of the witnesses intended to be examined, or the points to which they were to be examined (*b*); and if it were, in this case it was expressly stated, that the evidence of the *British* consul at *Corunna* was necessary, to establish the proof of the sale relied on, as he had not transmitted the certificate of registry, and *Mediterranean* pass, which he ought to have done; but his neglect should not prejudice this defendant; and as to the imperfection imputed to the affidavit, nothing further could have been deposed to in this case, from the nature of the transaction.

Per Curiam.—It would be departing from the common usage of the Court, to grant the present application. Such motions might, in future, be made in every case, on a suggestion, that material witnesses resided abroad; nor does it make any difference, that the witness be a *British* consul, or any

(*b*) *Rougemont v. Royal Exch. Ass.* 7 Ves. 304.—*Oldham v. Carleton*, 4 Br. C. C. 88.

other

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other public officer; the Crown has, in all cases, a right to a *viva voce* examination of a defendant's witnesses. There is, indeed, a case in *Bunbury*, of a Commission having been granted by this Court, but that was made on the Navigation Act.

Rule discharged.

On the other part of the application, as it was originally made, the Court intimated, that as a question as to the identity of the vessel might be raised on the trial, which would be a conclusive reason for not suffering the ship to sail, and as no delay had been created by the conduct of the officers of the Crown, it was not probable that they would make an order of restoration, on any security being given.

1816.

1st March.

1815.

Friday,
26th May.

LARAGOITY v. the ATTORNEY GENERAL.

Where a vessel has been seized by the officers of the Customs, on charges of offences against other Acts of Parliament than that

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THE plaintiff, having failed in his application, (which is the subject of the preceding report), made to the Court in a summary way by motion, to stay the proceedings on the information at the suit of the Attorney-General, and to grant him a Com-

mission usually called the Navigation Act, if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the Court will, on motion, (a bill having been filed against the Attorney General for that purpose,) grant the defendant a Commission to examine persons residing abroad, and make it part of the order, that their depositions shall be received in evidence on the trial.

The affidavit of the solicitor for the defendant will be received in support of such a motion; and it will be sufficient if he swear, that he is informed of, and believes the statements in the bill, if he also add, *that his belief is founded on documents in his possession*, and that, from the nature of the defence involving the question of what country the ship belongs to, he considers the Commission necessary.

mission

mission to examine witnesses abroad, then filed the present bill, to effect the same object, by obtaining an injunction and commission, under the Equity jurisdiction of the Court.

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The plaintiff's case, as made by the bill, was this* :—It stated, that the vessel which had been seized by his Majesty's Revenue officers, and was now claimed by the plaintiff, had been purchased by him of her former *British* owners, under the following circumstances ; she was originally an *English* brig, and had, in the month of *November* 1812, been the property of *A. B. French*, of *London*, merchant, and was then called the *William Pitt*. In the course of that month, she had been freighted by him with a cargo of merchandize for sale, to some port in *Spain* or *Portugal* ; and, on that occasion, he obtained from the Custom House, a license, as was usual with such merchant vessels, to carry out a certain quantity of arms and ammunition. On her arrival in *Portugal*, in *December*, he offered her for sale ; and, in *January*, he formally commissioned *John French Burke*, of *London*, merchant, who was then about to go to *Spain*, by power of attorney, authenticated by all due ceremonies, both in *England* and *Portugal*, to sell the vessel, on his part ; and he (*Burke*) accordingly did proceed with her to *Vigo*, in *Spain*, and there sold her, with all her tackle, apparel, furniture, &c.

* From the novelty and importance of this special application, it is thought right, that no material fact in the peculiar circumstances of the case in which it was granted, should be omitted ; and therefore, the whole transaction is succinctly related in the report.

for

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for 45,000 reals, to *F. M. Menendez*, a natural-born subject of the *Spanish* Government, and a merchant, then resident at *Vigo*; which sale was completed, with all the minute formalities required by the laws of *Spain*, and ultimately recorded in the proper office at *Vigo*. *Menendez*, having then procured her tonnage to be ascertained, and having made an affidavit (as usual on such occasions), that the said vessel had been purchased with his proper monies, and that no foreigner, either alien or naturalized, had any share or interest therein, caused her to be registered, under the name of *The General Porlier*. The *British* certificate of register, and *Mediterranean* pass, belonging to the said vessel, was subsequently delivered up to the *British* vice-consul at *Vigo*, and by him transmitted to *Richard Allen*, Esq., the *British* consul-general at *Corunna*, (in whose possession they were stated then to be.) In the following *March*, *Menendez* sent the vessel to *Corunna*, where, with equal authenticity and observance of forms, he sold her again, at a profit of 2,500 reals, to the present plaintiff, a merchant, residing at *Corunna*, and a natural-born subject of the Crown of *Spain*, who appropriated her, by the same solemnities as had been observed in the former transfer, and who again changed her name, for that of *The San Juan Baptista*. The plaintiff, having so become possessed of the vessel, equipped and fitted her out as a privateer, and, for that purpose, duly obtained from the *Spanish* Government, a letter of marque and sea-pass, for the seas of *Europe*. Those documents were officially endorsed by the competent authorities on the 23d of *May* 1813,
(from

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(from which time only they would be valid), and, in the same month, the vessel was sent to sea by the plaintiff; and he, at the same time, appointed the said *J. French Burke* his agent in *London*. In the course of her cruize, she captured the *Danish* merchant vessel the *Carlotta*, bound from *London*, with a cargo of colonial produce, and carried her into *Portsmouth* harbour, in *July* 1813, as prize; as, it was alleged, he lawfully might, the *Spanish* nation then being at war with *Denmark*. On that occasion, an inquiry was set on foot as to the legality of the capture, and the truth of the captor being a *Spanish* vessel, when her letter of marque, and all her other papers, underwent a strict investigation, by the *Spanish* consul-general resident in this country, who finally declared them to be authentic; and, in consequence thereof, the Judge of the Court of Admiralty, the Secretary of State, and the Lords of Council, refused an application, made to them by the persons interested in the captured vessel, to liberate the prize, and detain the privateer. She then sailed again from *Portsmouth*, leaving her prize in that port, whither she returned in *August* following; but being about to proceed to *Corunna* with her capture, both vessels were arrested by the officers of the Customs,—the *Carlotta* on a charge of having guineas on board, and the *San Juan Baptista*, on the offences imputed to her by this information, in breach of certain statutes and of the orders in council. The bill then stated the proceedings in the suit, down to the time when it was filed, and charged, that the plaintiff was able distinctly to prove, by witnesses residing in *Spain*, that when the vessel

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vessel sailed from *England* she was not armed contrary to her licence, (as was charged in one of the counts of the information); and that, at the time of her seizure, she was actually and *bonâ fide* a *Spanish* vessel, and the property, by purchase for a valuable consideration, of a subject of the Crown of *Spain*, and, consequently, not amenable to the *British* navigation laws, or bound by the treaties of *Britain* with other states; that, without the testimony of such witnesses, and the aid of properly authenticated copies of the various documents relating to the sale of the vessel, the plaintiff could not safely proceed to the trial of the information; and therefore, he prayed that a Commission might be issued, for the purpose of examining such witnesses, and that an injunction might be ordered to stay further proceedings till the Commission should be returned.

The Attorney General having put in the usual answer to this bill;

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26th May.

Martin, and *Campbell*, now moved, according to the prayer therein; and, in support of the motion, put in an affidavit made by the plaintiff's solicitor, stating, that he had been advised, and believed, that the material question on the issue under the information, was, whether the *St. Juan Baptista* was, or was not, a *British* vessel, at the time of her seizure by the officers of the Customs; that he had been informed, and believed, *from documentary evidence which had come before him*, in the course of conducting the plaintiff's defence to the information,

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tion, that the said vessel was, at the time of her seizure, a *bonâ fide* Spanish privateer, the property of the plaintiff, who was a *Spaniard*, and resided at *Corunna*. It then went on to state, that the defendant had been informed, and believed, that the sale had taken place, as alleged in the bill, and that the defendant had repaired and fitted out the vessel at his own expense, and personally hired the crew ; that he had been informed, and believed, that the *British* register, and *Mediterranean* pass, of the said vessel, was in the possession of *R. Allen*, Esq. the *British* consul residing at *Corunna*, and that he would be a material witness for the defendant ; that, without such documents and evidence, he could not safely proceed to trial, of which notice had been given for the Sittings after *Easter Term*.

Under these circumstances, it was submitted, that as, between subject and subject, a Commission would be granted, as a thing almost of course, as necessary to the justice of the case, there could be no reason why there should be any exception in the case of the Attorney General. It would, in most instances, be otherwise impossible that the alien owner of a ship, cruising under the flag of a foreign state, could defend his property against such a proceeding as this. The other arguments in support of the present motion, were much the same as those used on the former occasion. The first case of those given in the notes in the following page, having been cited, the Court, expressing a desire that what precedents on the point there were to be found among the records of this Court, and of the Court of Chancery,

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Chancery, might be brought before them, granted a rule to show cause.

The cases in the note* (transcribed from the records) were now offered to the consideration of the

* *Sabbi, undecimo die Novemb' 1699.*

Inter *Johan Ward* Geñ. (qui tñ.) &c. queñ.

Et *Francum Willet* claĩ proprietat, &c. sup informat seizur.

Et inter p'fat *Francum Willet* queñ

Et Attorn. Dñi Regis Geñal & p'fat *Johan Ward* def.
q' billa Angli can.

Middlesex. Upon the motion of Mr. *Bernard*, of counsel with the plaintiff in the said *English* cause, informing the Court, that *all the linen in question, in these causes, are all of the manufacture of Germany, and imported into England from thence; and that the same were seized by the said John Ward, the plaintiff in the said information, as goods and merchandize of the manufacture of some of the dominions of the French King; and the said Francis Willet having thereupon filed his said bill, in order to obtain a Commission to examine his witnesses beyond the seas, to which bill his Majesty's Attorney General, and the said John Ward, had put in their answers, to which answers the said Francis Willet had replied, and his Majesty's said Attorney-General, and the said John Ward, had rejoined; it was therefore now prayed by the said William Bernard, that the trial of the cause in the said Ward's information, may be put off till next Term, and that the said plaintiff, Willett, may in the mean time have a Commission for examination of his witnesses beyond sea; and that the same may be read, and made use of as evidence, upon the trial of the said Ward's information; and, upon reading the affidavits of Humphry Willet and Francis Burgois; and upon hearing Mr. Eltrick and Mr. Browne, on behalf of the said Willet; and of his Majesty's Attorney General, Mr. Dodd, and Mr. Bridges, on behalf of his Majesty, and the said Ward;*

the Court ; and it was said, that the Court of Chancery furnished no precedents of similar motions.

Dauncey,

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Ward ; It is this day Ordered by this Court, That the trial on the said plaintiff *Ward's* information, shall be put off till the last sitting of the next Term ; and that, in the mean time, the said *Francis Willet*, the plaintiff in the said *English* cause, may take forth a Commission for examination of his witnesses in parts beyond the seas, wherein his Majesty's Attorney General, and the said *Ward*, may join, if they think fit ; but, in case they will not join therein, within a week after the Term, the said *Willet* may take forth a Commission *ex parte* ; and publication of the said depositions shall pass, upon return of the said Commission.

BUTLER *pro* WILLET.

Martis, vi' die Feb. 1699.

Same Cause.

Upon the motion of Mr. *Turner*, for defendant, to put off the trial till next Term, he having a Commission gone into *Germany* to examine witnesses, which is not returned ; and reading the affidavits of *Francis Willet*, Mr. *Etterich*, Mr. *Browne*, and Mr. *Barnard*, of the same side ; Mr. Attorney, Mr. *Dodd*, and Mr. *Bridges, pro quer.* ; Ordered, by consent of Mr. *Ward*, and at the desire of defendant, *Willet*, that the plaintiff have his costs taxed this afternoon, and paid him to-morrow morning ; and then the cause to be put off till next Term, to be tried ; otherwise the cause is not put off.

Mercurii, vii' die April, 1700.

WARD & WILLET.

Upon the motion of Mr. *Turner*, Ordered, that publication pass on *Saturday*, unless cause on *Friday* ; and the depositions, being returned in high *Dutch*, to be translated by a public notary, upon oath.

1816. *Dauncey, Clarke, and Mitford*, now showed
 LARAGOITY cause. They took a preliminary objection to the
 v. affidavit
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Martis, 16^a die Junii, 1724.

ISLE v. WESTBORNE.

Mr. *Bootle*.—To put off the trial. The affidavit of defendant read; Ordered, the plaintiff show cause on *Friday*.

Veneris, 19^a die Junii, 1724.

Same Cause.

Mr. Attorney General and Mr. *Toller* showing cause against order, 16th inst. Order read; defendant's affidavit. The trial put off, on payment of costs, and the plaintiff at liberty to examine his witnesses, giving the defendant a note before, of his witnesses.

Veneris, 20^a die Nov^r, 1730.

MOORE, *qui tam*, against LONGUIT.

London. Inter Thom. Moore, *qui tam*, &c. quer. et Sam^r Longuit, def.
 ꝑ Informač. Seizur.

Upon the motion of Mr. *Ward*, of counsel with the defendant, informing the Court, that the plaintiff having seized as forfeited, a ship called *The Fame Galley*, for importing a parcel of skins, contrary to the Act of Navigation; to which ship the defendant entered his claim, and exhibited his bill in this Court, against the plaintiff, in order to examine his witnesses beyond sea, pursuant to the direction of the Act of Navigation; to which bill the defendant, being duly served with the process of this Court, appeared: It was therefore prayed, that the trial of this cause might be put off till *Easter Term*, and that the defendant might have a Commission to examine his witnesses in *Bilboa, in Spain*; and that the depositions of the witnesses may be read as evidence at the trial of this cause, on the part and behalf of the defendant; when, upon reading the affidavit of defendants, and on hearing of Mr. Attorney General and Mr. *Bootle*, of counsel for the plaintiff,
 and

affidavit made in support of the motion ; which, they contended, as it stated no facts, and proceeded entirely

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and Mr. *Chute*, of counsel for the defendant ; It is this day Ordered by the Court, That the trial of this cause be put off till *Easter* Term, and that a Commission be awarded, as desired ; and that the depositions of the witnesses to be taken, be read as evidence at the trial of this cause, saving just exceptions.

Tuesday, the 25th of November, 1735.

LONGMAN, *qui tam*, &c. v. KEMBLE.

Mr. *Bootle*, for the defendant ; for a Commission to *Hamburg*, to examine witnesses in the affidavit of the defendant mentioned, and that the trial may be put off to next *Easter* Term ; defendant's affidavit read ; Mr. Attorney, and Solicitor General, for the plaintiff.

Ordered,—A commission ret. *sine delatione*, and the trial put off till the sittings after next Term ; and that the defendant have a writ of delivery, by consent, on giving the usual security.

Monday, the 28th day of November, 1737.

Between ADAM HENRY SCHWARTZ, SAMUEL
FELMAN, and ZUCKERBECKER } Plaintiffs.
And STEPHEN SCOTT - - - Defendant.

By Bill.

Upon the motion of Mr. *Bootle*, of counsel on behalf of *London*. the plaintiffs, informing the Court, that the said defendant having lately seized to the use of His Majesty and himself, a ship or vessel called *The Constant*, with the tackle, apparel, and furniture thereof, and several parcels of hemp, pipe and hogshead staves, and fir timber, the property whereof has been duly claimed by the said plaintiffs ; that the said defendant has filed an information of such seizure, in this Court, and has therein laid the cause of forfeiture of the said ship and goods to be, that the said goods were imported into *Great Britain*, in the said ship not being navigated pur-

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entirely on the information of persons not named,
and on the belief of the solicitor for the plaintiff; and

suant to the Act of Navigation; and further informing the Court, that the said now plaintiffs have several witnesses, at present living at *Riga*, within the dominions of the Empress of *Russia*, who can prove the said ship to be navigated according to the said Act; had filed their bill of complaint in this Court, against the said defendant, *Scott*, in order to have the benefit of a Commission to examine the said witnesses; and the said defendant having put in his answer to the said bill, it was therefore prayed, in *pursuance of a clause in the said Act of Parliament*, That the plaintiffs may have a Commission, under seal of this Court, for the examination of witnesses in this cause on behalf of the said plaintiffs, at *Riga* aforesaid, and that the trial of the cause in the said information of seizure, may be put off till the said Commission shall be returned; and on reading the affidavit of *Hare Hayson*, and hearing His Majesty's Attorney General, on behalf of the said defendant, *Scott*; It is this day Ordered by the Court, That a Commission shall forthwith issue, under seal of this Court, for the examination of the said plaintiffs witnesses at *Riga* aforesaid; and the said defendant, *Scott*, may, if he think fit, cross-examine the said witnesses, and for that purpose, he is to name and strike Commissioners in four days, or else the said plaintiffs are to issue the said Commission *ex parte*; and that the trial of the cause of the said information of seizure shall be put off till the next Term, on payment to the said defendant, *Scott*, of costs incurred, for such matters as will not serve again to be taxed by the Deputy Remembrancer of this Court; and the said plaintiffs are not to prosecute any action at law in the mean time, against the said defendant, *Scott*, touching the seizure of the said ship and goods.

Saturday, the 8th day of February, 1755.

ATTORNEY GENERAL against STOCKTON.

Mr. *Cay*.—To put off trial to next Term. Affidavit of defendant, *William Stockton*, read, and of *Thomas Bampffield*.

Mr. Attorney General to show cause on *Tuesday* next.

Wednesday,

and referred to documentary evidence, without describing the nature of those documents, was not, therefore,

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Wednesday, the 12th of February, 1755.

Same Cause.

Mr. Solicitor General showing cause against the Order of the 8th instant, Order read, and affidavit of defendant, *Stockton*; affidavit of *George Davy*.

Mr. *Starkie*, for *Stockton* and *Mackenzie*, Mr. *Cay* for same. The trial put off to next Term, the defendant undertaking to try it peremptorily, and consent that the plaintiff may examine witnesses in the mean time, with liberty to the defendant to cross-examine, on payment of the costs of the applications, and of such matters as will not serve again by the defendants, *Stockton* and *Mackenzie*.

Tuesday, the 11th February, 1755.

MANBY, *qui tam*, against HALLOWAY.

By Information of Seizure.

Upon the motion of Mr. *Starkie*, of counsel with the defendant, informing the Court, that the said informant having seized as forfeited, the goods in question, to which goods the defendant entered his claim of property in this Court, and gave security for costs, as the law directs; and the said informant having filed an information upon the Act of Navigation, the defendant having since filed his bill in this Court against the said informant, in order to examine his witnesses beyond the sea, pursuant to the direction of the said Act of Navigation; to which bill the informant, being duly served with the process of this Court, appeared; It was therefore prayed, that the trial of this cause might be put off till next Term, and that the defendant may have a Commission to examine his witnesses at *Rotterdam*, in *Holland*, and that the depositions of the witnesses may be read as evidence at the trial of this cause, on the part and behalf of the said defendant, saving just exceptions; when, upon reading the affidavit of the said defendant, and

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therefore, a sufficient verification of the statements in the bill, to satisfy the Court that there existed good grounds

also the bill, It is this day Ordered by the Court, That the trial of this cause be put off till next Term, and that a Commission be awarded as desired, returnable the first day of next Term; and that the defendant be at liberty to join in such Commission, unless cause be shown to the contrary by the said informant to-morrow.

Friday, the 21st May, 1756.

BUTTS and another, *qui tam*, against HART and another.

Upon the motion of Mr. *Perrott*, of counsel for the said defendants, praying, for the reasons mentioned in the affidavit of *Richard Cracraft*, the younger, that the said defendants may have a new Commission, under the seal of this Court, directed to proper Commissioners at *New York*, for the examination of their witnesses in this cause, returnable on the first day of next *Michaelmas* Term, and that the trial of this cause may be put off until the sittings after the said Term; on reading the affidavit of the said *Richard Cracraft*, the younger, and hearing the honourable *William Murray*, Esquire, His Majesty's Attorney General, on the behalf of His Majesty and said *Thomas Butts* and *Henry Hastings*; It is thereupon Ordered by the Court, as prayed.

Wednesday, the 22d of November, 1758.

COPGROVE, *qui tam*, &c. against HOLDING.

Between *Richard Copgrove*, *qui tam*, &c. informant, and *Henry Holding*, claiming the property of a ship or vessel called *The Dorothea*, with her tackle, &c. and a parcel of molasses, seized by the said informant defendant, by information of seizure.

Upon the motion of Mr. *Starkie*, of counsel for the defendant, informing the Court that the said *Richard Copgrove* had lately seized as forfeited, the ship and goods in question, whereto

grounds for granting the application. The cases, they contended, were not in point, being those in which Commissions had been granted under the Navigation Act; and no instance of a similar application had been found. A case of *Head (qui tam) v. Farrer*, was cited for the Crown, where a similar motion had been refused.

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[It was urged, that the depositions could not be used at the trial, if the application succeeded; but the Court said, it would be part of the order, that they should be received in evidence.]

On the other side, it was submitted, that no affidavit was necessary in such a case as the present; that the cases cited, though certainly arising out of offences

whereto the defendant had entered his claim in this Court; and that the said informant having filed an information on the Act of Navigation, the said defendant duly pleaded thereto, and issue was joined thereupon; since which the said defendant hath exhibited his bill in this Court against the said informant, for the examination of his witnesses beyond the sea, pursuant to the direction of the said Act of Navigation; to which bill, the said informant being duly served with the process of this Court, appeared; It was therefore prayed, that the trial of this cause might be put off to *Easter Term* next, and that the defendant might have a commission to examine his witnesses in *Holland*, and that the depositions of such witnesses might be read as evidence at the trial of this cause, on the behalf of the said defendant, saving all just exceptions at the said trial; and upon reading the affidavit of the said defendant, and the said bill, It is Ordered by the Court, That the trial of this cause be put off to the sittings after next *Hilary Term*; and that a Commission, with liberty for the said informant to join in the same, be awarded, as prayed.

1816. offences against the Navigation Act, still were in point, to show that the Court exercised its common law authority to grant Commissions in those cases; LARAGOITY v. ATTORNEY GENERAL. for they did not proceed on the provision in that Act which merely gives the Court of Chancery power to grant a Commission in a summary way, on mere motion, without the expense and delay of a bill previously filed, as was necessary before that statute; and that the present case was more in the nature of an offence against the Navigation Act, than the statutes for the suppression of smuggling.
Cur. adv. vult.

Friday, 1st March. THOMSON, *Chief Baron*, delivered the opinion of the Court.—(*After having gone minutely through the circumstances and proceedings which had taken place, and reviewed the arguments used on either side.*)—The question arises upon those counts in the information which assume the vessel to belong wholly, or in part, to a *British* subject; on which it becomes necessary, that the plaintiff should prove the property to be in him; which he alleges he can do, by means of witnesses in *Spain*, if the Commission for which he has applied should be granted.

This application has been strongly resisted on the part of the Crown, as one in which the Court ought not to interfere, there being no similar instance in which they have ever done so. On the other side, the case of *Jenkins v. Larwood* was cited as an instance in point.—(*Having gone through that case.*)—It does not appear by the report, whether that application

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application was made on a bill filed, or not. Since that case, there have been many instances of Commissions being granted out of this Court, on applications by defendants in informations, most of which, if not all, were cases of breach of the Navigation Laws. In one of which, the case of *Ward v. Willett*, a Commission was granted to examine witnesses for the defendant, in aid of the action at law ; but it is doubtful whether that case arose out of an alleged offence against the Navigation Act ; and I perceive it was not a proceeding with a view to the condemnation of any vessel, but was a seizure of goods, on a suspicion of their being of *French* manufacture. Now this case is somewhat similar to that. The question to be tried on this information is, to what country the ship seized belongs. The authority of this Court, to grant Commissions in such cases, is founded on its general jurisdiction at common law, and is not derived under any particular statute ; and it acts on the necessity of its interference, to afford a defendant aid in trials at law.

It has been urged, that the affidavit made by the attorney for the defendant, proceeding solely on information and belief, is insufficient for the purpose of the present motion. So it would be, if it did no more : but it is there sworn, that his belief proceeds on documentary evidence in his possession ; and it is further stated, that the defence to the action depends mainly on the proof of the country to which the vessel belongs.

It has been suggested, that our granting a Commission

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mission in this case, would become a dangerous precedent, which might hereafter affect the proceedings of the Crown, in all cases of informations filed against defendants for breaches of the revenue laws; but the Court does not see that any such danger is to be apprehended. They would always take care not to grant such applications without good and sufficient ground.

The offences charged in this information are analogous to breaches of the Navigation Act; for the result will depend chiefly on the inquiry, whether this be a foreign or *British* ship. The Court has taken much time to consider this motion, because it is altogether new in practice, although it is not new in principle; because it falls in with the general jurisdiction which belongs to it, of aiding by such means, defendants at law, in cases where justice and necessity require it; and in applications of a similar nature, the Court would watchfully protect the rights of the Crown from being abused by pretences; for this is a motion by no means of course.

We think that, in the present case, the plaintiff is entitled to have a Commission, as prayed; in which the Attorney General, if he think proper, may join. And for that purpose, the trial of the information must necessarily be postponed till the sittings after the next Term.

Order made absolute.

WATTLEWORTH

WATTLEWORTH v. PITCHER.

Same Day.

PARKER moved, that the injunction which had been obtained by the plaintiff, in this case, might be dissolved, with costs, for irregularity. The objection was, that the affidavit made in verification of the bill, stated that one of the bills of exchange, to recover the amount of which the action at law had been commenced, was dated on the 10th day of *July* 1812, whereas the bill alleged it to be dated the 15th day of *June* 1812; which, he submitted, was such a variance as must prove fatal to the injunction.

A variance between the affidavit in support of a motion for an injunction, and the bill, in the date of the bill of exchange, on which the defendant had commenced proceedings at law, is sufficient ground for dissolving the injunction obtained; and the Court will, on motion, dissolve it.

Maddock admitted the variance, which he described as a clerical error; but submitted, that the correct date having been set out in the affidavit, as to one of the bills of exchange, and there being no objection to the description of the other, which alone would be sufficient ground for obtaining the injunction, the order ought not to be set aside, on a matter of form in the pleadings.

Per Curiam.—This is a mistake which can not be overlooked. It is impossible that the Court can be instructed as to which is the true, and which the false date. The injunction must be dissolved.

Order dissolved.

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1st March.

ROB and another v. BUTTERWICK.

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The Court will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant, complained of as not being the intention of the covenantor at the time of the agreement, or inserted therein, will be directed to be expunged: although such covenant was introduced by the attorney of the covenantor, (but without his express authority,) on its being shown that the party had not considered himself when liable to such covenant he entered into the agreement.

THIS Bill prayed, that the defendant might be decreed to execute a fresh conveyance of tithes purchased of him by the plaintiffs, agreeable to what was charged to be the true intent and meaning of the articles of agreement entered into between the parties, on which the conveyance objected to was founded; and that an injunction might in the mean time be granted, to restrain the defendant from proceeding further at law, to recover a proportion of the arrears of rent claimed to be due from the plaintiff.

The facts on which the bill was filed were, that the parties having contracted for the sale of certain tithes, held by the defendant on lease from the Archbishop of *York*, under an annual rent of 20 *l.* payable to the Archbishop, and subject to a further annual payment of 40 *l.* for the purposes therein mentioned, articles of agreement, dated 16th *December* 1795, were executed between them, of which the following are the material parts: The defendant, rector of *Thirsk*, in the county of *York*, agreed, in consideration of the sum of 2,840 *l.*, to execute on a future day, a conveyance of the said tithes, and a barn, usually let therewith, to the use of plaintiffs, their heirs and assigns, for and during the lives and life of the longest liver of the several persons for whose lives the said tithes were granted to defendant, with all benefit and advantage
of

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of renewal, from time to time, upon the death of any of them; the said conveyance to contain all covenants usually comprised in conveyances of estates for lives and terms of years. "And it was thereby covenanted and agreed upon between the said parties, that the plaintiffs, their heirs or administrators, should and would from time to time, and at all times, upon the renewal of any of the lives for which the said tithes were then or should be thereafter held, bear, pay, and sustain a proportionable part of the fines, fees, and expenses of renewal, in respect of the said tithes thereby contracted for, after such manner and proportion as the said sum of 2,840*l.* bears to the full value of all the tithes of him the said defendant, at *Sowerby, Thirsk, Carlton, and Sandhutton*, and as the same were lately valued by Mr. *John Amsley*;"—that soon after the execution of the said articles of agreement, indentures of lease and release were duly prepared and executed between the parties, in pursuance thereof; that about years after the execution of the said indentures, the defendant made a demand on plaintiff, for the payment of a proportional part of the rents reserved by the original indenture of lease from the Archbishop of *York* to defendant; when plaintiffs, conceiving such demand to be contrary to the agreement, referred to the indenture of release, and, for the first time, discovered the following clause:—"Subject to the doing and performing
" a proportionable part of the covenants and agree-
" ments to be done and performed in and by the
" said original in part recited indenture of lease, in
" respect of the said tithes and premises therein-
" before

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“ before mentioned, and intended to be thereby
 “ released. And it is hereby further declared and
 “ agreed, by and between the said parties hereto,
 “ that upon any renewal of the lives by which the
 “ said tithes and premises then were or should be
 “ thereafter held, they the said plaintiffs, their
 “ heirs and assigns, shall and will bear and con-
 “ tribute their proportionable parts or shares of
 “ the *said yearly rents reserved in and by the*
 “ *said in part recited lease, and also of the said*
 “ *finest, fees, and expenses of renewal,*” &c. The
 bill then charged, that the words in *italics* were inter-
 lined in the said deed in a different hand-writing ;
 that, at the time of their executing the said release,
 the plaintiffs had no suspicion or belief that any
 such covenant or interlineation had been intro-
 duced in the said release, but that they signed it
 under the idea, that the same corresponded literally
 with the terms of the said agreement.

The defendant, in his answer, insisted that the
 interlineation was consistent with the spirit, true
 intent, and meaning of the parties to the agreement,
 and with the terms thereof ; and alleged, that the
 interlineation itself was introduced by the plaintiffs
 own solicitor.

It was in evidence, that some years (either five or
 eight, for the witnesses differed as to the time), after
 the execution of the deeds, the plaintiffs were, for
 the first time, called on by the defendant to pay a
 proportionable share of the reserved rents, which they
 refused to do. It appeared, by the answers given to
 the

the interrogatories on the Commission, by the person who had been employed by the plaintiffs to treat for the purchase of the tithes, that nothing was said about the reserved rents; and he also stated, that he did not consider that the plaintiffs were to have paid any part of them, or he should not have agreed for so large a sum. The professional person who prepared the deeds, and was, on that occasion, the solicitor of both parties, in answer to the interrogatories put to him, swore that he had made the interlineation himself, before the execution of the deeds, and that he had done so of his own accord, without consulting either party; because he had considered, that it had been the intention of both parties, and that it was therefore a necessary alteration.

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On these facts, it was contended, by *Martin*, and *Perkins*, for the plaintiff, that the subsequent deed could not be extended beyond the terms of the contract on which it was founded, which had been attempted to be done by the interlineation in the deed now complained of, imposing a burthen on the purchasers which the agreement did not warrant, and there did not appear to be any authority for the insertion; and it has been decided (*a*), that a specific authority is necessary, to bind the principal by the act of his attorney; that, at least, the plaintiff was entitled to an issue, to ascertain how it had found its way into the deed, and whether it had been in the contemplation of the parties, at

(*a*) 3 P. Wms. 277.

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the time of the purchase, that the plaintiff was to pay a proportion of the rent reserved.

Fonblanque, and *Roupell*, for the defendant, contended, that the Court could not interfere, in the present instance, to reform the deed of conveyance, inasmuch as there was no express variance between the articles of agreement and the subsequent release; the latter, had only supplied the silence of the former. The principle of equitable interference, in the reform of deeds, is, that there must be strong evidence of fraud, or of an obvious mistake; as if, for instance, the agreement had expressly provided, that the assignee was *not* to pay rent; but in the present instance, there was no such clause, and he was, as assignee, to take the tithes, subject to the rents and covenants to which the assignor was liable; and such would have been the effect of a deed framed in the language of these articles; such is the nature of all assignments; or otherwise, an express indemnity would be necessary. The interlineation complained of, was made by the plaintiff's attorney, and the acts of professional men are binding. The policy of the law excludes parol evidence, offered to impugn any written instrument, still less the *habendum* of a deed, and after so long a period.

In the case of *Irnham v. Child (b)*, Lord *Thurlow* lays down the principle at great length,

(b) 1 Br. Ch. C. 95.

and

and declares the rule to be clear, that where there is a deed, it will admit of no contract that is not part of the deed. The attempt made on this occasion, if successful, would destroy that principle, and be productive of mischievous consequences; and therefore ought not to be acceded to, but in a case of the clearest deviation from the true intent and meaning of the parties to the agreement; which so far from being the case in this instance, it was a much more natural conclusion, that a covenant so fit and proper to be introduced as the one complained of, was intended by the parties to be introduced into the deed as a matter of course, so consistent was it with the nature of the agreement.

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THOMSON, *Chief Baron*, now delivered the opinion of the Court. In stating the circumstances, his Lordship observed, that with respect to the interlineation complained of, no fraud was imputed to any party. The effect of that interlineation, however, would be to render the plaintiffs liable to pay a proportional share of the rents reserved. Now, certainly, there is not in the agreement the least reference to the plaintiffs paying any such proportion. It is an agreement for the absolute purchase of the tithes. The rent reserved, must have been matter of attention to the parties at the time of the agreement; and the more so, as there are two reserved rents,—the one payable to the Archbishop, and the other in trust for certain purposes.

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After the execution of the deed, no demand of rent was made by the defendant on the plaintiffs for some years ; but at length a demand is not only made, but the action brought, which it is now sought to restrain.

The solicitor who prepared the deed, has been examined as to the fact of the interlineation. He says, that he was employed by the plaintiffs as their solicitor in the purchase ; and he states very fairly, that the words interlined are of his hand-writing, and that he inserted them at the time of examining the engrossment with the counterpart, and previous to the execution of the deed by the plaintiffs ; but that he did so without any express authority, but merely because, in his judgment, he considered them proper and necessary ; and that the deed, and words so interlined, were read over in the presence of the plaintiffs, previous to the execution.

On the other hand, *John Smith* has deposed, that he was employed by the plaintiffs to treat for the absolute purchase of the portion of tithes mentioned in the pleadings ; and that the defendant agreed to an absolute sale for the sum paid ; that the purchaser was only to pay a proportional part of the fines and fees on the renewal of the lease ; and that no conversation or agreement took place on any occasion, respecting the payment of any proportional part of the rents reserved. He then proceeds to state, what indeed is obvious, if that be so, that if any such proposal had been made, he should have

have expected an abatement out of the purchase-money, or that he would not have consented to have given so large a sum for the tithes.

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Rob
and another
v.
BUTTER-
WICK.

Then the question is, whether there is such evidence before the Court as to induce them to interfere in the manner prayed. It is not suggested, that the parties came to any new agreement, respecting payment of any part of the reserved rents. The agent says, that nothing was said about payment of rent; and the nature of the transaction does not of itself warrant the interlineation. The payment of a proportional part of the fine on renewal, certainly appears to have been the sole burthen intended to be borne by the purchaser; and we think, that what was afterwards added in the deed, arose from a misconception on the part of the solicitor, but clearly without intending any fraud. We are of opinion, that it was not warranted by the original agreement; and that, therefore, this suit is well founded. There must be a fresh conveyance executed, as prayed, which it must be referred to the Master to settle.

There was another mistake, in the proportion of the fine to be paid being according to a valuation. That must be made matter of inquiry, in the same way. In the mean time, the injunction which has been obtained must be continued.

It should be observed, that the interlineation complained of, was the act of the plaintiffs own attorney, certainly.

1816.

Friday,
1st March.

The KING v. ROCK and others.

The Court will not grant an *amoveas manus*, to remove the King's hands from partnership property seized under an extent, against one of the firm, in the first instance.

The course is, to apply for a reference to the Deputy Remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained by consent, on giving security.

THE defendants, together with *Thomas Eyton*, deceased, were partners composing the firm of the *Shrewsbury Bank*. On the death of *Eyton*, who had been receiver-general of taxes for the county of *Salop*, his effects, including the whole of the property, credits, and effects of the banking concern, were seized into the hands of the Crown, under two writs of *diem clausit extremum*, issued against the property of *Eyton*, and executed in the county of *Salop* and city of *London*; in consequence of which, the bank had been obliged to stop payment.

Blosset, Serjeant, applied for an order to show cause, why an *amoveas manus* should not be granted as to the partnership property; informing the Court, that the partnership debts amounted to more than their joint assets, by 6,995*l.* 2*s.* 2*d.*, which deficiency was to be answered out of the separate estates of the defendants; that the joint business was indebted to the defendants respectively; but that the said *Thomas Eyton* was indebted to the joint business in 5,450*l.*; and he mentioned a case in this Court, of *The King v. Clough**, where the Court

* In that case (26 Feb. 1812), it was ordered, (on motion on the part of the assignees under a commission of bankrupt against *Clough* and his partners), that the Attorney General should show cause why the inquisition and extent should not be quashed, or the assignees be permitted to claim; and on hearing

Court had interposed in the case of a seizure of partnership effects, and had ordered a reference, to ascertain and distinguish the separate and joint property.

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Per Curiam.—There have been many instances of such a reference to the Master being ordered; but we cannot grant an order for an *amoveas manus*.

Motion refused.*

hearing the parties, it was ordered, that the assignees should be permitted to enter their claim, and that it should be referred to the Deputy Remembrancer, to inquire and report what separate property the defendant was entitled to on the 24th of *July* last, (the date of the inquisition); and it was further ordered (by consent), that there should be a reference, to take an account of what proportion of the property the partners were entitled to on the said 24th *July*, and of the debts due to and from the partnership, and to ascertain the clear surplus and proportion to which each party, and particularly *Clough*, was entitled.

* An *amoveas manus* was afterwards ordered, *by consent*, on the defendants giving security by bond to answer the Crown's debt out of the effects seized, as far as it might appear, on taking the joint and separate account between the partners, that the Crown would have been entitled, as against those effects, without prejudice to the Crown, the sureties of *Eyton*, or the sheriff of *Salop*.

1816.

3 Dec 1805
2 Dec 1810

22d April.

BRACEBRIDGE v. BUCKLEY.

The Court will not give relief in equity against a lessor's right of re-entry, for a forfeiture by breach of a covenant to lay out a sum of money on the premises in repairs within a given time.

THE plaintiff prayed to be relieved from the forfeiture of a term incurred by breach of a covenant in his lease, to lay out 1,000*l.* in repairs on the premises within twelve months from the commencement of the demise; and for an injunction, to restrain the defendant from proceeding in an action of ejectment, which he had commenced, to recover the possession of the premises.

And that notwithstanding there have been no requisition made by the landlord, for performance of the covenant, and although he have suffered the tenant to continue in possession of the premises for three years after the

The bill stated, that the parties having agreed on the terms of the lease some time in the year 1805, the following note was made of the agreement then entered into between them:—‘Memorandum of agreement between General *Buckley* and Mr. *Bracebridge*, for the house in Duke-street, late Dr. *Symonds*'s; conditions as under;—
‘term for sixty-one years, from *Lady Day* 1806;
‘rent 140 guineas. General *Buckley* to pay the
‘rent of the garden as now paid; the land-tax
‘redeemed.—Mr. *B.* to lay out 1,000*l.*’

breach of covenant, but has not received rent from him in the mean time, or otherwise recognized the subsistence of the tenancy.

The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition, of performance by the lessor; and a neglect on the part of the tenant, is tantamount to a refusal in Law.

The ground on which the Court refuse to relieve, in such a case, is, that they have no effectual means of ascertaining, or of making compensation to the Covenantee.

Nor is it enough, to show that no damage has been sustained by the delay, and that the premises may be put into as good or better condition than they would have been if the covenant had been punctually performed, or even that, by a mistake of the solicitor who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the previous agreement, or so understood at that time by the parties themselves, denied by the answer.

At

At that time (it was stated), the house was very much out of repair ; and the plaintiff having caused the premises to be surveyed, found that it would require a much larger sum (3,000*l.*) to put them into complete repair. He represented the result of that survey to the defendant, and requested an abatement of the rent in consequence, which he refused ; but proposed instead, to extend the term to eighty-one years, the original agreement in all other respects to stand ; which was acceded to by the plaintiff. The defendant, on the 28th *November* 1805, executed a lease according to that agreement. In the indenture, there was inserted a covenant, that the plaintiff *should, within twelve months, lay out and expend on the premises, in good and substantial repairs, the sum of 1,000*l.**, and should and would, during the said term, at his own costs and charges, sufficiently repair and maintain the same, and deliver them up at the end of the term, in sufficient repair and condition. The plaintiff took possession under the lease.

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It was alleged in the bill (as one ground of the plaintiff's equity), that notwithstanding the said covenant had been introduced in the lease, it was in fact understood between the parties, that the plaintiff was to take his own time to proceed with the repairs ; and that the time limited by the covenant for that purpose, was a mistake of the nature of their agreement on the part of the defendant's solicitor, who prepared the lease ; that the state of the premises was such as to render it necessary that a great part of the house should be entirely rebuilt.

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BUCKLEY.

The plaintiff continued in undisturbed possession until the month of *August* 1809, without having been called on by the defendant to begin to repair. He then received a letter from the defendant's solicitor, demanding payment of one year's rent, due up to *Lady-Day* 1807; "from which time," (the letter added), "General *Buckley* does not consider you his tenant." The plaintiff, finding that it was intended to take advantage of the covenant, wrote to the defendant, proposing to enter into an engagement to rebuild the premises within a reasonable time, and to lay out 4,000*L.* on them; and, in the following *October*, tendered the whole of the arrears of rent due.

The defendant, in his answer, admitted the facts stated in the bill, except that it was understood between the parties, that the money was to be laid out as suited the plaintiff's convenience, or other than according to the terms of the covenant; and denying that the premises were so much out of repair as had been represented, and stated, that the repairs had not then been begun.

It was in evidence, from the depositions of a surveyor, that the premises had sustained no injury by not having been earlier repaired; and that the money might be more advantageously laid out on the premises at the time the defendant proposed to do it, than before. And it was deposed by the solicitor who prepared the lease, that the defendant had not required that the period for laying out the repairs should be limited by the covenant to twelve months; and

and that the introduction of such limitation was a mistake; and that the defendant had, on the contrary, observed to the deponent, that the longer the money was delayed to be laid out in the repairs, the more advantageous it would be to him.

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On the 12th *December* 1809, the Court granted an injunction, on argument and the authority of the cases, till the hearing or further order; directing the plaintiff, in the mean time, to pay the arrears of rent due, without prejudice.

The cause was afterwards heard by the Court, on a motion to dissolve the injunction which had been obtained; on which occasion it was ordered to stand over for further argument; and now

Roupell resumed the argument, on behalf of the plaintiff; and contended, that this was a fit case for the interference of a Court of Equity, to relieve against the covenant. He placed his chief reliance on the case of *Sanders v. Pope (a)*, which had been founded on a series of previous authorities*, and incontestably established the jurisdiction of Courts of Equity to grant relief in such cases. In that case the Chancellor (Lord *Erskine*) had relieved against a forfeiture, under circumstances less

1814.

5th *December*.

(a) 12 Ves. 282.

* All the authorities on this point are so fully gone into in the course of the judgment, that they are omitted in the discussion at the bar, where they were collated and commented on with great research and ability.

favourable

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favourable to such an application than those under which the present plaintiff applied. As far as that case goes, it is precisely the same as the present; and no objection can be made in this which would not have applied to that. The principle of the Equity is, that wherever a compensation can be made for a breach of covenant, the Court will relieve against the forfeiture. The strong grounds of the present application are, that the plaintiff is willing to submit to any terms the Court shall impose, even to place the defendant in a better situation than he would have been if the covenant had been performed strictly. The plaintiff has been permitted to continue in the undisturbed possession of the premises for two years after the alleged breach of covenant, and a great arrear of rent has been allowed to become due subsequently, notwithstanding the forfeiture; whereby the plaintiff has been lulled into a security, not inconsistent with the mutual understanding between the parties at the time of entering into the agreement. Those circumstances, and the fact of there being no limited time for commencing the repairs, mentioned in the original agreement, sufficiently confirm the evidence of the solicitor,—that it was not the intention of the parties, that the time should be so limited. During all that time, the defendant never applied to the plaintiff on the subject, or required that he should begin to repair; on the contrary, he seems to have considered, that the delay would have been for his advantage. A Court of Equity will expect that such application should be made, or that some notice should be
given

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given of the lessor's intention to enter, unless the covenant be performed, before they will permit a sudden advantage to be taken of an involuntary and uninjurious omission to do what may afterwards be done. The neglect, in this case, has rather been on the part of the defendant, in not calling on the plaintiff to perform the covenant before, or giving him fair notice that otherwise he would avail himself of the omission. He has waived his right by not immediately, or at least sooner, adopting his remedy. This is not the case of a refusal or wilful neglect to perform the covenant; and that is a distinction made in all the cases.

In *Hill v. Barclay (c)*, where relief was refused, and which would be, but for that material difference, a case in some sort adverse to this application, there had been a demand made, of performance of the covenant before the ejectment was brought. In the conclusion of the Lord Chancellor's judgment on that case, the refusal to comply with the requisition to repair, is expressly stated as a ground for withholding the relief. The Chancellor emphatically so distinguished the case of *Hill v. Barclay* from that of *Sanders v. Pope*.

Another favourable circumstance in the present case is, the large amount of the rent; and it is,

(c) 16 Ves. 402, and 18 Ves. 56*.

* The case particularly alluded to by the Chancellor, (but not named) in page 61 of the Report in Vesey, and somewhat animadverted on, is obviously *Hack v. Leonard*, and not *Brown and Gutter*, as stated in the note.

therefore,

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therefore, not like the cases wherein the rent is, in consideration of the sum to be laid out in repairs, little more than a nominal acknowledgment.

[RICHARDS, *Baron*, suggested, that a difficulty occurred to him throughout, which had not yet been removed; and that arose from the impracticability of a Court of Equity seeing that precise compensation were made to the party in a case like the present. The Court, for that purpose, should have some means of satisfying itself, that its decree would be carried into effect; and without an officer duly appointed to superintend what repairs should be ordered, it could not be done.]

It was answered, that the case of *Sanders and Pope*, as well as other authorities, had pointed out the mode of effecting that object; which was, by directing an inquiry to be made, of what sum would be necessary to put the premises in the same state of repair as they would have been in if the money had been applied according to the contract.

The Court inquired of the result of a case of *Rolfe v. Harris*, then lately before his Honour the Vice-Chancellor*, which arose out of an application for relief against a breach of a covenant to

* *ROLFE v. HARRIS.*

Courts of Equity will not relieve against a forfeiture for breach of a covenant to insure, &c. Vide *Reynolds v. Pitt*, p. 212.

The bill was filed for relief against a covenant in a lease to insure the premises, which the plaintiff contended ought not to have been introduced into the deed; or against the forfeiture which had been incurred by the breach, if the Court should be of opinion that the covenant ought to stand. The plaintiff's father, *William*

to keep up an insurance; and it was submitted at the bar, that whatever was the final determination

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William Rolfe, had agreed with the city of *London*, for a lease of a house in *Skinner-street*, for a term of sixty years, from *Christmas* 1806, at a rent of 225*l. per annum*. In *April* 1807, the defendant became entitled to the freehold in the premises, under the City Lottery Scheme, subject to the said agreement for a lease. Previous to the execution of the conveyance to the defendant, the City executed the lease to *W. Rolfe*, in which was inserted a covenant, that the lessee should insure the premises from fire, and keep and continue them insured, from thence till the end of the term; and that, during the term, he should keep them in good repair, and so leave them. The bill charged, that that covenant had been introduced by inadvertence, without consideration paid; and that it was not warranted by the original agreement.—That in *September* 1808, *W. Rolfe* assigned his lease to the plaintiff.—That a short time before *Christmas* 1809, the defendant caused the plaintiff to be served with a notice to insure the premises, according to the covenant, and he effected an insurance in 2,000*l.* for one year; but that he neglected by accident, in the hurry of business, to renew the insurance by *Christmas* in the next year.—That two days afterwards, the defendant insured the premises, and, without notice, brought an ejectment for the breach of covenant, and obtained a verdict.

The answer denied that the covenant was inconsistent with the original agreement; and that the plaintiff had omitted to insure by accident; and charged, that he had declared he would not insure without regular notice.

No written agreement, nor any memorandum of agreement, was produced; nor were the contents of any agreement, if once in existence, stated or proved. It was not shown that the covenant had been objected to by the lessee, or his solicitor, who perused the draft of the lease.

It was in evidence, that the defendant had never called on the
the

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mination in that case, the neglect was wilful, as the defendant had there also required the performance

the plaintiff to insure, till *Christmas* 1809, although he had been in possession, under the lease, from *Christmas* 1806.

19th April.

The Vice-Chancellor, in a long and elaborate judgment, delivered his opinion on this case, of which the following are the principal heads:—In stating the facts, his Honour adverted to the absence of the original agreement itself, and the very imperfect account which was given of what were stated to be its contents; that nothing was expressed but the parties, premises, term, and rent. Three distinct questions arise in this case; first, whether the plaintiff can be relieved from the covenant altogether, on the ground that it was inserted by mistake; secondly, whether the defendant had waived his right of availing himself of the breach of covenant, by not having called on the plaintiff before; and thirdly, whether this Court will relieve the plaintiff against the forfeiture, on his performance of the covenant. On the first point, (his Honour, it appears, said), the plaintiff has neither by the bill, or by the evidence in support of it, made out a case for relief, by expunging the covenant to insure. It is a principle, that the party who controverts a deed, should show the Court most satisfactorily, that it is not consonant with his agreement, and that there must have been some mistake or fraud; whereas, in this case, neither is the agreement produced, or the terms of it put in proof; and what evidence there is, is rather the other way. To rectify a deed by striking out so material a covenant, is a strong act, and requires a very strong case. In the present, there is no pretence for such an interference of the Court.

The next question that arises is, whether the defendant had waived his right to re-enter for the breach of covenant. Now this bill is not framed to bring that point fully before the Court; and it is only brought forward, as a circumstance in favour of the main objects of the application; but if there had been any waiver, it would have been matter of defence at law, and

formance of the covenant, and the plaintiff had neglected it. The Court desired to know, if much stress

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and that destroys the equitable ground on which that part of the plaintiff's case stands.

As to the compromise which was attempted to be effected between the parties, and which has been alluded to, that having gone off, on account of a disagreement about the terms, can have no weight as a circumstance, in the case; and if there were any thing in that, it would also have been more properly matter of consideration for the Court in which the ejectment was brought.

That brings us to the third object of the bill,—whether the Court ought to give the relief sought against the forfeiture, for the breach of the covenant? and that is certainly a very important question.

By the terms of the lease, the tenant was bound to keep the premises in repair, without any exception in case of fire. Under that covenant, he was an insurer to the landlord, as far as his responsibility went; but not chusing to depend on that alone, he insists on the further security of an insurance in one of the public offices. Notwithstanding the covenant, the tenant did not insure from 1807 to 1809, when the landlord gave him notice to perform the covenant; and his attention being thus called to it, he did insure for one year: but, at the expiration of that policy, he omits to renew it; and when asked, whether he has insured, it appears that his answer is, not that he intended to insure; but that he had not, and would not without receiving a regular notice. Now, though he had previously been given a notice, it was more than he was entitled to; and the defendant might have ejected him without, upon the first omission, for the breach of covenant. But all notion of inadvertence was thereby excluded; and if it were not so, the covenant amounts to a condition, that the tenant shall hold no longer than whilst he insures.

His

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stress was laid on that circumstance by his Honour :
but it was submitted, that in all events, that feature
of

His Honour then went at large into the authorities, (*all of which are cited in the principal case ;*) from which he deduced the following principles, as the general result and effect of the decisions :—That where the Court will relieve, the omission, and consequent forfeiture, must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation ; but that where the transgression is wilful, or the compensation impracticable, the Court will refuse to interfere. If the latter branch of the doctrine were not established to restrain the latitude of the jurisdiction, it would be a most dangerous jurisdiction, as was well observed by Lord *Eldon*, who asks, what is there to govern a Court of Equity, in the exercise of such a discretion ? The decision in *Sanders v. Pope*, appears to have been founded rather on dicta than authorities, and goes further than the authorities warrant.

Why, in such cases as these, of relief against breach of contract, is a Court of Equity to be called on to make a new contract ? The parties agree, that if the condition be broken, the lessor shall re-enter ; and the Court is asked to give damages instead. What damages can the Court give ? and what damages could reconcile a man to a tenant who breaks his contract, and brings his landlord before a Court of Equity by a bill, to be relieved against the effect of his own injurious neglect ; and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so ? It seems to me, to be a mischievous and arbitrary jurisdiction ; and, if exercised at all, ought to be confined to cases of a pecuniary nature, such as non-payment of rent, and money not paid by a day certain, and where such breaches stand alone. In such cases, perhaps, compensation may be made ; but when the principle of compensation is applied to other cases, such as waste, and not repairing, it becomes very difficult, if not impracticable, to effect it. The only mode of measuring damages is by an issue, *quantum damnificatus* ; and
that

of the case, and the consequent risk which had been incurred during the interval, sufficiently distinguished it from the one now before the Court.

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The *Lord Chief Baron* then expressed a wish to know, what had been finally done in a case of
Reynolds

that may turn out to be wholly unsatisfactory, and, in many instances, not capable of being carried into effect, by any means, as in breaches of covenant for assigning without leave. In this very sort of case too, how can we, when a risk has been run, estimate the quantum of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be, that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer, for want of power to enforce his covenant. Whatever may be done, therefore, in general cases, the Court ought not to relieve, in forfeiture for breaches of the covenant to insure. I should have been of the same opinion, if I were not so well borne out by authorities on this point, as I find I am. Having stated the case of *Wadman and Calcrafft*, and observed that the question there was distinctly, whether the power to relieve was restricted to cases of non-payment of rent; and having adverted to the other cases, the effect of which is to confine the jurisdiction of the Court, in applications for relief against forfeiture, his Honour particularly and emphatically took a view of the case of *Reynolds v. Pitt*, (cited in the next page.) That case, he observed, was precisely in point with the present in all its circumstances, and proceeded on a breach of the same covenant, (for trivial distinctions should not be introduced in important cases;) and that alone would be a sufficient authority for refusing the relief sought.

Upon principle, therefore, and precedent, I am of opinion, that I am not warranted in giving the relief prayed against the forfeiture; and I think, that in no part of this case ought the plaintiff to be relieved.

Bill dismissed, without costs.

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*Reynolds v. Pitt**, which was also a suit instituted for relief against a forfeiture for a breach of a covenant to insure, and had originally come on in this Court; where, according to his Lordship's note of it, an injunction had been granted: but it was afterwards carried into the Court of Chancery, and was brought on both before the Master of the Rolls and the Chancellor.

On that case, also, the same distinction was taken.

THOMSON,

* REYNOLDS v. PITT.

1812.

18th February.

L. Simmons
100.

Pitt had let Grigsby's Coffee-house to *Elizabeth Shewin*, for twenty-one years, with a covenant in the lease, that she should insure and keep it insured during the term, at 800*l.*, in some one of the public Insurance Offices, with a proviso for re-entry, in case of breach of covenant. She took out a policy for seven years at the Phoenix Office, which expired at *Lady Day* 1808. She then neglected to insure for two whole years; but during that time, regularly kept up an insurance on her own goods, in the Sun Fire Office. *Pitt*, however, forgave that omission, and she took out a policy for one year, which expired *Lady Day* 1811. On the 25th or 26th *April* 1811, *Pitt* called at her house, to inquire about the insurance, when she was absent from home. On the 27th, he brought an ejectment; on the 26th or 27th, she had paid one year's premium on the policy, and took a receipt for it.

When she found that an ejectment had been brought against her, she filed a bill in the Exchequer, for an injunction. *Pitt* having put in his answer in time, she moved for an injunction on the merits, on the 21st of *May* 1811; when the Court ordered *Pitt's* costs at law to be taxed by the Deputy Remembrancer, and that, on payment of the costs so taxed, an injunction should issue.

On

THOMSON, *Chief Baron*. If a man covenant to do an act within a certain time, no demand is necessary; and a neglect of performance is tantamount to a refusal in Law.

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Barber,

On the 27th *May*, a commission of bankrupt issued against *Shewin*, on which she was declared bankrupt, and assignees were chosen. On the 30th *June*, the costs were taxed at 34 *l.* odd. No tender was made of the costs till the 9th *November* *Pitt's* solicitor then refused to receive them, and gave notice of trial. The assignees then filed a supplemental bill, and in *Michaelmas* Term, moved for an injunction, offering to pay the costs; which motion was refused, with costs.

The assignees then dismissed their bill; and in *Hilary* Term filed another bill in Chancery, which *Pitt* answered, stating all the foregoing circumstances. On the day after *Hilary* Term, they made a motion before his Honour the Master of the Rolls, for an injunction to stay execution; and on this day his Honour said, the covenant to insure, differed widely from a covenant to pay rent. If rent were not paid at the day, still no danger was incurred, if it ultimately should be paid. But, in case of non-insurance, the risk was incurred immediately. His Honour doubted if the Court of Exchequer were right in granting an injunction in the first instance; and he refused the motion with costs.

On the second seal after *Trinity* Term, the plaintiff gave notice of a motion to reverse his Honour's order; which the Chancellor refused, with costs. His Lordship, on that occasion, stated all the cases on the subject, from *Cage* and *Russell* down to *Hill v. Barclay*.—Mr. *Hart* had insisted on the case of *Rolfe v. Harris*, 6th *May* 1811.—The Chancellor said, that the result of the cases was, that Courts of Equity would not relieve against wilful default, except in the case of breach of covenant by non-payment of rent; nor will they relieve, except where the damages, &c. for which compensation may be made, are certain.

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Barber, for the defendant, contended, that there had been no waiver of his right to enter for the breach of covenant, as he had not, by any subsequent act, recognized the plaintiff as his tenant, either by receiving rent or any other; and that a mere delay in prosecuting that right, has never been held to amount to an abandonment of it.

In support of the proposition, that this was not a case for the interference of a Court of Equity in granting relief, the following cases were cited and commented on:—*De Scarlet v. Dennett*(a); *Flint v. Brandon*(b),—where the Chancellor refused to decree specific performance of a covenant to fill up a gravel-pit, saying, if a specific performance is decreed, a question may arise, whether the work is sufficiently performed,—*Wadman v. Calcraft*(c); *Sparks v. The Liverpool Waterworks Company*(d); *Hill v. Barclay*(e); all of which establish the principle, that a Court of Equity will not relieve, in any case of a breach of covenant, unless it be in the excepted instance of non-payment of rent, and then only where there has been no other covenant broken.

22d April.

The Court, this day, delivered their several opinions.

RICHARDS, *Baron*, (*having stated the case*).
 The point before the Court is, whether the plaintiff,

(a) 9 Mod. 22.

(b) 8 Ves. 159.

(c) 10 Ves. 67.

(d) 13 Ves. 428.

(e) 16 Ves. 402. 18. Ib.

under

under the circumstances of the case, shall be relieved from the forfeiture, and be allowed a reasonable time to repair the premises.

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The prayer of the bill is for general relief.

There is no fraud imputed to the defendant, and no mistake attributed to the plaintiff. He must have been perfectly aware of the covenant which was in the lease, on the new agreement. (*His Lordship read the terms of the covenant.*) This was the contract between the parties; and I conceive it would be held, that it must be performed, in a Court of Equity, as it would in a Court of Law, unless there were cases against it. I only know of one in 9 Mod *. There have, indeed, been some others cited, as applying, in the course of the argument. That in 2nd Vernon † I do not understand; nor do I see the ground of the decision in 9 Mod. I am well aware that, in ancient times, Courts of Equity assumed a larger jurisdiction than they do now; anciently, they corrected men's contracts without any foundation. Lord *Alvanley* observed, on that doctrine, that it had been carried to a length that became alarming, but that it had, of late, been much restrained; and that Courts of Equity would no longer relieve from forfeitures for breach of covenant, except where the party, having done all he could to perform it, had been prevented by unavoidable accident ‡. In the case of penalties, I think the Courts have very properly interfered.

* *Hack v. Leonard*, 9 Mod. 90.

† *Webber v. Smith*, 2 Vern. 103.

‡ *Eaton v. Lyon*, 3 Ves. 693.

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A penalty is merely a mode of making it the interest of parties to perform their contracts, as in case of bonds given for the performance of covenants. So in borrowing money on mortgages, if the principal money and interest be ultimately paid, the contract is substantially performed. Rent, if paid, although a forfeiture has been incurred by non-payment, has been held to be a ground of relief against the forfeiture. In those cases, the rent is certainly not paid in due time, exactly according to the condition of the covenant; but interest being paid on the arrears, though that may be not quite equal, in point of advantage to the landlord, to primary performance, has been decided to be sufficient. But as to covenants such as the present, I know not how they are to be performed, unless according to the terms, or what compensation can be given for non-performance; or, if there could be any made, how it can be offered.

Here, indeed, none is offered. *Hack v. Leonard*, is a case much relied on in support of this application. There, indeed, the Chancellor said, he could not see what damage the landlord could sustain by the building being suffered to be out of repair, provided the lessee kept the main timber from being rotten, and left all in good repair before the end of the term. Now that does not amount to a decision. But even that case had nothing to do with compensation; nor was any decreed. A reference was ordered to ascertain what damage had been done; but to whom, and how, is compensation to be given? Certainly not by decreeing a sum of money to the lessor, to enable him to repair, for he could not

S

enter

enter for that purpose ; and are you to trust to a Jury to say what sum would be necessary to put the premises in repair ? I do not, therefore, think that a case which makes at all in favour of the plaintiff ; nor does the ground of the determination appear, so as to afford a principle.

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I will not travel through all the cases which precede that of *Sanders v. Pope*, in which Lord *Erskine* went into them all largely ; but he pronounced no decree, perhaps, because the parties compromised. I am anxious to know what decree could have been made.

No doubt the contract of these parties required that 1,000*l.* should be laid out within a year ; and I wish to know how what they contracted for can now be done ? If not done within the given time, the contract is not performed. The lessor cannot call on this Court to compel the lessee to perform the contract ; and why should the lessee call on the lessor to forego it. There is, certainly, no direct authority against the case of *Sanders v. Pope* ; but both the present Chancellor and the Master of the Rolls have intimated, by *dicta*, that they think otherwise ; and I think, that the case of *Hack v. Leonard* does not sustain Lord *Erskine's* decision. I am of opinion, therefore, that the lessor, in this case, is entitled to re-possess his estate, by consequence of the non-performance of the covenant.

But the bill suggests, that the lessee will expend as much money as will put the premises in as good repair

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repair as if the 1,000*l.* had been laid out, according to the contract. In that case, it must be referred to the Master, to say what money would be required; and the sum directed by him to be laid out, though sufficient at that time, might, by a change of circumstances, become insufficient when the repairs are in progress.

This bill was filed in 1809; now if the lessee had died insolvent in the mean time, and pending the suit, what compensation could have been made to the lessor? In covenants to insure, the Court will not relieve, as has been decided; and what distinction is there in such cases and the present? If *Bracebridge* had died, and repairs had become necessary again, must an action of ejectment, and another bill in Equity, be again resorted to? But above all, how can the thing sought be done? The lessor cannot enter to superintend the repairs; and must the Master be directed to do so? If this had not been a long Term, it might by this time have been exhausted. The Chancellor has said, the Court will not superintend repairs. The Master cannot; it is impossible. Lord *Thurlow* thought a building could not be erected under the superintendence of the Court*; Lord *Hardwicke* thought a building might†: but both thought that repairs could not be carried on under the direction of the Court. The Court, therefore, cannot give a compensation, because they have no means of

* *Lucas v. Comerford*, 3 Br. C. C. 166.—1 Ves. 235.

† *City of London v. Nash*, 3 Atk. 512.

ascertaining

ascertaining, precisely, what the compensation should be, or the mode of making it, when ascertained. If affidavits were adduced, they could not enable the Court to arrive at any conclusion. I am of opinion, therefore, that this bill should be dismissed.

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Lord *Erskine's* decision did not give satisfaction in *Westminster Hall*.

WOOD, *Baron*. I am of opinion, that the decision in the case of *Sanders v. Pope*, is founded on proper and equitable grounds. In *Hill v. Barclay*, I know the Chancellor has expressed himself rather against it; but I think *Hill v. Barclay* is rightly decided, and does not affect *Pope* and *Sanders*, for the cases materially differ. The tenant (the plaintiff in this suit) offers to do now all that he was bound to have done; and though a long time has elapsed, yet no request was ever made to the tenant to perform his contract; and it is in evidence, that the premises have sustained no injury, and can now be put in repair. On what principle, then, can a Court of Equity refuse relief? In pecuniary penalties, Courts of Equity have, from the earliest times, relieved. The course of proceeding was formerly, before the statute, by action assigning one breach, (a plaintiff could then not assign more). A verdict being found for the penalty, a bill was afterwards filed, wherein the plaintiff alleged, that there were other breaches: upon which an issue was directed, and the Court relieved. This circuitous mode excited the attention of the Legislature; and occasioned the statute of 8 and 9 *Wm. III.* ch. 12,

allowing

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allowing the assignment of various breaches, and enabling the Jury to assess damages.

It is true that most of the cases of the interference of Courts of Equity relate only to pecuniary penalties, and not to forfeitures ; but where is the distinction, if a compensation can be made ? Now what has been done in Equity, in the case of forfeitures on specific grounds ? In the case of rent, Equity always relieves ; and now, by statute *(f)*, the tenant may pay into Court, at any time before the trial of an ejectment, the arrears of rent and costs, and all further proceedings shall cease. In the first case that occurs, *Cage v. Russel (g)*, is to be found, I think, the true rule to direct Courts of Equity in giving relief, though the case does not further apply on the present occasion. There the Chancellor relieved, saying it was a standing rule of the Court, that a forfeiture should not bind where the thing could be done afterwards, or a compensation made for it. The next case is that of *Webber v. Smith (h)* ; and that must have been a case where there was a clause of re-entry in the lease. A re-entry had been made for non-payment of rent, and not repairing. The Chancellor said, the Court cannot relieve but on payment of rent, and repairing all the premises. That is an authority that, on a general covenant to repair, the Court will relieve. Then, in the case of *Hack v. Leonard (i)*, the Court relieved against a breach of a general covenant to repair, because compensation could be made ; and that is an authority

(f) 4 Geo. II. ch. 28, sec. 3. *(g)* 2d Ventris, 352.

(h) 2 Vern. 103.

(i) 9 Mod. 91.

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for referring it to the Master, to ascertain the damages sustained, with a view to making compensation. There are certainly cases of refusal, but they are where no compensation could be made; and that distinction is taken throughout. The only good objection arises, where it cannot be known what would be a sufficient compensation in damages. In *Wafer v. Mocato (i)*, the reason given for refusing relief was, because, in assigning without license, it is unknown what shall be the measure of damages; but, it is added, where the Court can give compensation in damages, it will relieve. Now the damages can be ascertained in neglect of repairs, as well as in any other case. In covenants not to assign, no such damage can be ascertained, because the tenant, though he might be perfectly solvent, may not be, in other respects, such a man as the landlord would chuse. So in *De Scarlett v. Dennett*, before Sir Jos. Jekyll, if a highway be over my land, no compensation could be made in damages. In *Grimston v. Lord Bruce (k)*, which I cite merely for the language, Lord Chancellor Cowper says, that wherever the Court can give satisfaction for a breach of condition, they can relieve.

Equity will relieve in almost all cases of forfeiture, if they can put the parties in as good a condition. In *Northcote v. Duke (l)* also, it is held, that "Equity will relieve, if there can be a compensation." The Chancellor also says, "I think the Court may relieve where a tenant cuts down timber."

(i) 9 Mod, 112. (k) 1 Salk. 156. (l) 1st Ambler, 511.

There

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There have also been many cases where relief has been given against forfeitures of copyholds. It was granted in *Thomas v. Porter* (*m*), where the copyhold had been forfeited by cutting down timber. It was also granted, in *Nash v. Lord Derby* (*n*). In *Cox v. Higford* (*o*), the Court relieved against a forfeiture for want of repairs. There is also a case in *Saunders's Reports*, of *Peachy v. The Duke of Somerset*, where relief was refused; but that was on the ground that it was a voluntary forfeiture, the tenant having made leases contrary to the custom of the manor, without license from the lord.

But the modern decision, of *Sanders v. Pope*, is precisely the same case as the present, in all respects; and it is a strong and unanswerable decision in favour of this plaintiff; so much so, that to refuse relief here, is to over-rule that case, and a series of others antecedent, on which, after much argument and research, that decision was founded. It is evident, that his lordship had taken great pains to inform himself, to be enabled to give judgment. I will now consider the cases that have thrown a doubt on *Sanders v. Pope*. The first of these is, *Wadman v. Calcraft*. That, however, was before, and is also a very imperfect case; there is no argument used there, nor a single case cited, in support of it; nor was the case itself mature for relief. The next is, *Hill v. Barclay*, and that is the most important, for in it all the others are brought before the Chancellor. In that case notice had been given, that if the tenant did not repair, advantage would be taken

(*m*) 1 Ch. Ca. 95. (*n*) 2 Vern. 537. (*o*) Ib. 664.
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of the forfeiture. Several objections are taken in that case to the practicability of giving relief, which I do not think very well founded. I will endeavour to answer the Chancellor's difficulties in that case. The first is, that it would be necessary to ascertain the state of the premises; which, it is said, the Court has no means of doing. To that I answer, that that may be done by an issue, which is the ordinary course. Secondly, he asks, How can it be ascertained that the subsequent repairs do put the landlord in the same state? To that I answer, by the same means. Then, thirdly, he says, there is no mutuality, for the tenant cannot be compelled to repair, and that the Court cannot entertain a bill for that purpose, according to Lord *Thurlow's* opinion. I agree there can be no specific performance of a general covenant to repair, decreed; but does it follow from thence, that a Court cannot relieve against a forfeiture? Was it not done in *Webber v. Smith*? And do not Courts of Law set aside judgments continually, on condition that the party will do what is required of him, and what he ought to have done? The course of reference to the Master, is an answer to all those difficulties. From the case of *The City of London v. Nash*, it appears, that a party may come into Court on a covenant to build. In the case of *Moseley v. Virgin* (p), the Chancellor, observing on what had fallen from Lord *Thurlow*, on the then prevalent opinion that no decree could be made on a covenant to repair, who added, that he did not see how it could be made on a covenant to build, says, that certainly admits this qualification:—If the transaction.

(p) 3 Ves. 184.

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and agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance ; but if it is loose and undefined, and it is not expressly stated what the building is, so that the Court could describe it as a subject for the report of the Master, the jurisdiction could not apply. There is no such objection here ; the house is defined, and the sum to be laid out in repairs (expressly 1,000*l.*) is defined. Fourthly, he objects, that there might be a possibility of the tenant's standing out. The answer is, no Court would relieve a second time. Fifthly, He suggests the difficulty of ascertaining the difference which it would make to the landlord, if the sum of money to be laid out within five years, were not laid out till the sixth year. I answer, by reference to the officer. Obstinate conduct would certainly deserve no relief, but here there was no such thing ; and it is proved, that the covenant may at this moment be performed, with as much or more advantage to the landlord, than if it had been done before. Now as there has been no request on the part of the landlord, it is a mere case of simple omission, unattended with injury, and not of obstinate or wilful neglect. No doubt the determination in *Hill v. Barclay*, is perfectly correct, on the grounds taken, one of the most material of which was, that there was a demand of the performance of the covenant made by the landlord, which the tenant disregarded. I do not think, therefore, that the Chancellor has, by that decision, held the case of *Sanders v. Pope* overruled ; but that it is, on the contrary, confirmed by his having taken the distinction,—that, in the case before him, the landlord had made a requisition to repair

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repair, and the tenant had refused to comply. Some part of the Chancellor's language, I confess, appears to militate against the decision in *Sanders v. Pope*, but not the ground of his judgment. A case of possible intermediate insolvency, is put as an objection to relief, where the money has not been laid out within the time prescribed; no doubt, in such a case, that fact would be a sufficient ground of refusal; but no such thing has happened, or was probable in this case. All the cases must depend on the tenant, and be governed by their own particular circumstances. Where, indeed, he has been guilty of wilful waste, or even presumptive waste, relief might be properly refused; but not for a mere want of repair, which, at the time of the application to be relieved, can be effectually supplied. When there was notice to repair, and nothing was done, the Chancellor did not think it right to relieve. *Reynolds v. Pitt* was mentioned, and *Rolfe v. Harris*; those were cases of a refusal to insure, and relief was refused, on the ground of the defendant having incurred risk; but in both the plaintiffs had refused to perform the covenant. And in cases of wilful waste, or of an obstinate tenant intending to injure his landlord, the Court would properly refuse to interfere in his behalf.

I certainly agree, that under a change of circumstances, there might be a reason for refusing relief, as in case of bankruptcy; but there are none of those reasons in this case. As in the case of Lord Salisbury's re-entry, in *Webber v. Smith*, would
you

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you turn out a whole street because one tenant had not repaired?

I think, therefore, that the plaintiff should be relieved, on laying out 1,000*l.* now, and paying all costs which have been incurred, both at Law and in Equity.

GRAHAM, *Baron*. I agree that a Court of Equity will relieve, where a complete compensation can be effectually made, and the party put in *statu quo*. But I am at a loss to understand what is meant by compensation in such a case as this. In cases where penalties have been incurred, it is effected by payment of a sum of money, and so in the instance of rent in arrear; but this is a very different case. Formerly leases were much more simple than at present; at length it was thought necessary to have various covenants framed, and clauses of re-entry were introduced for the security of the landlord, which Courts are bound to protect.

There is an instance where the Lords would not relieve, against a covenant not to plough up meadow, under a penalty of 5*l.* per acre, though the land was not worth 5*s.* *Rolfe v. Harris*, is a strong case of refusal to relieve against a breach of a covenant, which had been performed but a few days after the stipulated time. If any compensation could be made to the defendant, it must be done by a sum of money to be paid to him, to be laid out, which he does not desire, nor can he be compelled to

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to accept it. As to ordering a reference, suppose the Deputy Remembrancer reported 1,500*l.* to be necessary to put the premises into repair, and the tenant, before he had laid it out, became bankrupt, that would stop the performance. In *Lucas v. Comerford*, Lord *Thurlow* said, there can be no decree to rebuild, any more than to repair. He considered superintending repairs as impracticable; indeed no one could do it but the Chancellor himself, for it must come back to him eventually, if referred in the mean time to the Master. In *The City of London v. Nash*, Lord *Hardwicke* says, there can be no decree to repair; and had he decreed a building, he would have found a difficulty there, however clear it might have been made to appear on paper. In *Webber v. Calcroft*, it is clear the Chancellor and the Master of the Rolls thought there could be no relief against a covenant to repair; it is a task beyond the power of the Court. If we should grant relief, we should decide that all such clauses are merely *in terrorem*, though made with care, and by skilful conveyancers. There are many cases where such breaches are pleaded, as an answer to bills for a specific performance of agreements for leases; and issues have been directed, to ascertain the truth of that defence, which could not have been so ordered but on the ground that if the fact were so, the Court would not relieve. Equity never interferes, I think, except where the thing can be specifically done, as in the case of rent, or payment of a sum of money; and there the statute (4 Geo. III.) proceeding on the same equitable ground, enables parties to pay the money into

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Court. I am surprised it should be thought that a series of cases support the doctrine of relieving in such a case, for I think it will be found to be only where a compensation can be made in the way of damages; but here the money should have been laid out in repairs. All the cases refer to where the party injured is to receive damages, which could not be the case here, for a recompence in damages is not required, nor would that remove the effect of the breach of covenant. As to the cases of copyholds, a lord has a special right to interfere in the repair of a tenement; he may do so, lest the tenant should suffer it to fall waste.

Hill v. Barclay is supposed to be distinguishable from this case, but I cannot see the distinction. Lord *Eldon* does, indeed, refer to the notice given, but that cannot make a difference; the landlord, in that case, was partly obliged to give notice by the terms of the covenant, which was, in that respect, particularly worded. To have made such a requisition necessary, the tenant should have had a stipulation introduced in the lease, but that not having been done, the lease itself was notice, and a demand. It cannot be supposed, that General *Buckley*, by not proceeding *instantly*, was acquiescing in the premises not being put in repair, as has been suggested, and that he had waived his right of re-entry. In short, no rent was paid, and no repairs had been begun. I think, therefore, that this case is within the decision in *Hill v. Barclay*, and that the injunction should be dissolved.

THOMSON,

THOMSON, *Chief Baron*. This case has been so completely exhausted, that nothing remains for me to add. I agree with my brothers *Graham* and *Richards*; regretting exceedingly, that our opinion has not the concurrence of my brother *Wood*.

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Three years had elapsed since the 1,000*l.* was to have been laid out in repairs on the premises; and not a shilling having been expended, the ejectment was brought. And the question now is, what equity there is to prevent the defendant's taking possession under the verdict which he has obtained? It is in evidence, indeed, that the price of materials was higher at that time than afterwards; but what had the defendant to do with that? For if the plaintiff had laid out the money then, he would have been equally bound to continue the premises in repair to the end of the term, and so to have left them; so that that could have made no difference to the defendant. Lord *Hardwicke* did say, in the case of the *City of London v. Nash*, that the Court could superintend a building; but he only granted an issue of *quantum damnificatus*. Lord *Thurlow* has remarked, that he could no more superintend a building than repairs.

It really comes to a question, whether, in all cases of re-entry on breach of covenant, a Court of Equity will do away the covenant? The authorities of *Wadman v. Calcraft*, and *Hill v. Barclay*, do I think, establish what is right to be done in these cases. The first was for non-payment of rent. Ejectment

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was brought; and an issue was directed, to ascertain if there had been any breach of the covenant to repair; clearly with a view to a decision, that, if there was, that would be conclusive, and no relief would be given. Those cases are not, I think, shaken by the decision of Lord *Erskine*. Lord *Eldon* does, indeed, in *Hill v. Barclay*, make a distinction as to notice, but not, I think, a material one; and particularly as that arose on the penning of the covenant, as has been well observed by my brother *Graham*. That notice had, as Lord *Eldon* observes, given him a further time than three months.

The argument of my brother *Wood* is no doubt a very able one, and the Court will always be happy to concur; but, in this case, the majority are of opinion that the bill must be dismissed.

Bill dismissed,

But without costs, in consideration of the difference of opinion in the Court, and there having been conflicting cases cited.

BYAM v. BOOTH, (Manor or Township of *Kil-
lerby.*)

— v. LAWSON, (*Catterick and Brough.*)

— v. CROWE and others, (*Ellerton on Swale,
Bolton, and Scorton.*)

— v. WOOD and others, (*Tunstall, Colburne,
Scotton, Uckerby, East and West
Appleton, and Whitwell.*)

— v. FAUCETT and another, (the farm called
Greenbury Grange.)

Thursday,
25th April.

THE plaintiff, vicar of *Catterick* in *Yorkshire*, which is a large parish, consisting of sixteen several townships and hamlets, filed bills against the above

A vicar founding his claim to agistment tithe by showing that

he alone has taken the other small tithes, held to have made out his title to that tithe, although never till of late received or demanded by him or his predecessors, and although in ancient times the Crown had conveyed by grant to lay impropriators, tithe, not only of grain and hay, but of herbage ("*decimas feni et herbagii.*") Herbage does not, *ex vi termini*, necessarily mean or cover tithe of agistment, unless perception be proved.—*Wood, B. dissentiente.*

A *modus* pleaded, of a sum of money anciently and uniformly paid for tithes within a certain part of a parish, held good, although it far exceed the sum which such part should have paid if it had contributed its due proportion, with reference to the rest of the parish, measuring the share of such part according to its extent with respect to the whole parish, and although some witnesses show it to have been broken in upon, and one, that he remembered (as appeared from depositions in an old cause) the origin of the payment.

Depositions in an old cause admitted, although neither bill, answer, or decree could be found, p. 234, note.

Where an exemption from payment of tithes, is claimed for a grange formerly belonging to a privileged order, (*quandiu manibus propriis,*) the Court will direct an issue to try the exemption, and also to ascertain the extent of such grange, if doubtful, from the depositions in the cause.

The Court will not dismiss the bill of a vicar, who claims by it tithes throughout a whole parish, and only proves his claim in part of it; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial.—*Wood B. dissentiente.*

But, *semble*, the Court will not give him costs, where he seeks tithes generally, and recovers only in part.

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defendants, owners and occupiers of land therein, for tithes. The defendant *Booth* pleaded a modus of 4*l.* payable in lieu of all tithes, within the manor or township of *Killerby*.

Sir *J. Lawson*, for himself, and the other defendants joined with him, who were some of his tenants, claimed the tithe of corn, grain, hay, and agistment, extending over the townships of *Catterick*, *Brough*, *Tunstall*, and *Bolton*, otherwise *Bolton-upon-Swale*, *East Appleton*, and *Scorton*, as impropriator.

The defence of *Crowe*, in respect of the lands in the township of *Ellerton-super-Swale*, was nearly the same as that of Sir *John Lawson*, strengthened by the word *herbagium* having been used in some of the grants to his ancestors, and other documents of the *Ellerton* tithes.

Wood, and his co-defendants, pleaded the right to agistment in their several landlords, by the same title as that pleaded by *Lawson* and *Crowe*, which was, that they, and those claiming under them, (having admitted the vicar's title to all tithes, except corn and grain, hay and agistment,) were possessed of those tithes; alleging that the rectory of *Catterick*, and the advowson of the vicarage, were formerly part of the possession of the late monastery of *St. Mary*, in the suburbs of the city of *York*, and so continued down to the time of the dissolution of that monastery; and that the said monastery was one of the larger order; and that the alien priory of *Bagare* in *Britanny*, or some religious house in *England*, subordinate

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subordinate thereto, and also the monasteries of *St. Martin* and *St. Agatha*, near *Richmond*, in the said County of *York*, were, at the time of the dissolution thereof, respectively seised of or well intitled to certain portions of tithes within the said parish of *Catterick*; that the alien priory of *Bagare* was dissolved in the reign of *Edw. IV.*, and the monasteries of *St. Martin* and *St. Agatha* in the reign of *Edw. VI.*; and that on such dissolution the said rectory and advowson, together with all the tithes of corn, grain, hay, and agistment, arising, &c. within the said parish, became lawfully vested in the Crown. That the said parish of *Catterick* is very extensive, and hath from time immemorial been divided into several townships, (setting out the ecclesiastical divisions;) that by divers mesne conveyances from the Crown, *Sir John Lawson*, and the other defendants, had become seised in possession of all the tithes of corn, grain, hay and agistment, within the said townships; and that no tithe of hay or agistment hath ever been paid by him or his predecessors to the vicar of said parish, or any compensation in lieu thereof. All admit agisting barren cattle, but state that they have never paid agistment tithe.

Fawcett, and the other defendants joined with him, pleaded an exemption from all tithes extending over a tract of land within the said parish, consisting, as was alleged, of 500 acres, which was, and always had been called *Greenbury Grange*, and which having been formerly parcel of the possessions of the *Cistertian* abbey or monastery of *Fountains*, in *York*, had been immemorially privileged by

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exemption from tithes, whilst in the occupation or manurance of the owners; and as owners, these defendants now claimed the exemption pleaded.

A great body of evidence, depositions, and documents, was brought forward and read, on both sides.

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The modus set up in the first of these suits, was attempted to be shown to be a composition; the plaintiff submitting, that however ancient the payment may be shown to be, still, if it were not properly a modus, it would be no defence to the suit; and for that purpose it was stated, first, that it bore no proportion to the rest of the parish; for in the time of *Edw. I.* (as it appeared from some of the documents which were produced,) the tithes of the whole parish, consisting of nearly 20,000 acres, were returned by a survey as amounting to only 5*l.*; yet *Killerby* alone, comprising only 700 acres, paid 4*l.*: secondly, that that payment had not been uninterrupted and uniform, or had covered all small tithes; and to prove that the payment of the alleged modus had been formerly broken in upon, and that certain land-owners had been found compounding with the vicar for tithes, the depositions *, in a cause of Sir

* On these depositions being produced, they were objected to by the counsel for the defendants, because the bill and answer were not forthcoming, and it could not be shown that any decree was made in the cause; so that it does not appear in what character the parties stood with respect to each other; and otherwise they are mere naked depositions, unconnected with any object or result, and might be *res inter alios*. The case of *Illingworth v. Leigh*, as reported in 4 *Gw.* 1615, is very imperfect

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Sir *John Musters* and others (owners of *Killerby*) v. *Collingwood*, Clerk, in 1686, were produced, in which it was sworn by several witnesses, that the sum of 4*l.* *per annum* had been paid as a *compensation* for the tithes of calf, wool, and lamb; and one of them deposed, that *such composition had been first agreed on about forty-six years before the suit.*

To these objections it was answered, that the valuation of *Ed. 1st.* was not a conclusive document; that even if it were, the amount of the value of the vicarage might have so diminished, from the circumstances of the times; and in fact, the incursions of the *Scotch*, at that time of day, alone might account for such a decrease; that the depositions were equally inconclusive; for there being no decree made, it does not appear that they established any fact, and most of the witnesses say, that they never knew any tithe paid for *Killerby* in kind, and all, that the sum of 4*l.* was paid in lieu of tithe.

imperfect and doubtful, as far as it relates to the objection taken to the depositions being read, that the bill and answer were not forthcoming. In *Scott v. Allgood*, Geo. 1372, the Court rejected depositions taken in a cause not affecting the parties to that suit.

For the reading of the depositions, it was urged, that to require proof of the relative situation of parties to the particular suit, would be to exclude ancient depositions altogether, as that could not be done. The keeper of the records proves that the bill, answer, and decree has been searched for, and cannot be found. In the cases of *Illingworth v. Leigh*, and *Rex. v. Countess of Arundel*, Hob. 112, the Court admitted the depositions to be read.

The objection was over-ruled.

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The next and main subject of consideration was, the defence set up by Sir *John Lawson* and Mr. *Crowe*, that under the original grant from the Crown of the tithes of grain and hay, and, in the case of *Crowe*, of herbage, the tithe of agistment (never having been demanded or paid) belonged to the impropiator, and that was the principal question in the cause.

The depositions on the part of the plaintiff went to prove, that the vicar compounded for an annual payment in lieu of tithe of lambs, wool, calves, pigs, and poultry; and that his agent always took an account at *Michaelmas* of the turnips, potatoes and rape grown in the parish, for which he received a composition the following *Candlemas*.

For the defendant, the evidence set out the boundaries of the several townships and divisions of the parish; and proved that it was the general reputation throughout the parish, that tithe of agistment was not due to the vicar, and that, in point of fact, none had ever been paid.

The documentary evidence which was read is very voluminous, complicated, and confused; and as such parts of those which were material, or affected this question, were cited and observed on by the Court, in delivering their very elaborate judgment on these intricate causes, only such of them are given here as seem absolutely necessary to elucidate the question*.

The

* That part of the case which depends on such evidence, may perhaps seem proper to have been omitted altogether, for

The arguments of counsel are omitted, as the Court have stated such as were important at large, in giving judgment.

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for the sake of disencumbering the report of all such points as appear to depend on matter of fact, and confining it to the points of law. But whoever has attended the hearing of tithe causes, knows how much, on all such occasions, the ancient documents and their effect are discussed. So much so, that they become rather public, than private matter, and constitute a branch of the law relating to tithes; and the more particularly, as their various construction and operation is from time to time argued and determined in the Courts which have jurisdiction of such subjects.

These observations, it is hoped, will account for and excuse the extraordinary length to which, not only this case, but those which are hereafter to be published, may run. It is a constant source of constant complaint on the bench, that the reports do not sufficiently disclose the facts and circumstances of the decided cases, or furnish the Court with the grounds of the former decisions; and that deficiency must also have been materially felt in practice.

The following are the documents from which it has been thought necessary to transcribe extracts:

The taxation of Pope *Nicholas* in 1291, taxing the church of *Catterick* at 100 *l.*, and the vicarage at 13 *l.* 6 *s.* 8 *d.*; out of which latter the abbot and convent of *St. Mary* had an annual pension of 13 *s.* 4 *d.*

Extract from the Nona Roll of the 15th *Edw.* III.
 “ *Cateryk* taxed, with the vicarage, 113 *l.* 6 *s.* 8 *d.* The same
 “ (persons) answer for 93 *l.* 6 *s.* 8 *d.* for the ninth of the
 “ same parish, committed to *Robt Baronne* (and others);
 “ whereof 21 *l.* 13 *s.* 4 *d.* for the portion of the prior of *St.*
 “ *Martin*, and 1 *l.* 6 *s.* 8 *d.* for the portion of the abbot of *St.*
 “ *Agatha*, arising to them from temporalities in the same
 “ parish by assessments, &c.”

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The recent case of *Kenicott and Watson*, chiefly relied on by the counsel for the plaintiff, as to the main

21st August 1344.—The act of Archbishop *Zouch*, evidenced in the registry of the Archbishop of York—establishing the right and title of the abbot and convent of *St. Mary's, York*, to certain possessions which they had in his diocese, against common right, including therein the archdeaconry of *Richmond*; the church of *Catterick*, with its dependant chapels of *Bolton, Hipswell* and *Hudswell*;—also small tithes in *Scorton*, and the tithes of the mill there;—also small tithes in *Colburn*, and the tithes of the mill there;—also small tithes in *Ellerton*; which three places are in the parish of *Catterick*;—also a pension of 13s. 4d. from the vicarage of *Catterick*.

Ecclesiastical Survey, 26 Hen. 8th.

County of York. *Cateryke* vicarage. The church is appropriated to the monastery of the blessed Virgin *Mary, of York*.

Is valued in the mansion, with the glebe, *per annum*, 10s.

Tithes of hay, flax and hemp 1*l.* Lambs, calves and wool 21*l.* Minute and privy tithes, to wit, in the *Easter* book 6*l.*—(total) 28*l.* 10s. Charges, *viz.* in synodals, 8s.; procurations, 6s. 8d.; in an annual pension to the prior of *St. Martin, near Richmond*, 40s.: making, with the pension of 13s. 4d. to *St. Mary's*, 3*l.* 8s.; and it is worth clear, 25*l.* 2s.; for the tenth part thereof, 2*l.* 10s. 2d.

35 *Eliz.*—Extract of the Queen's lease for 21 years to *Edwin Sands*, of—"omnes illas decimas feni & herbagii nostras cum eorum juribus membris," &c. in *Ellerton-super-Swale*, infra parochiam de *Bolton-super-Swale*, &c.

6 *James.*—The King's grant in fee to *Philips and Moor*, of the same tithes, in the same words.

6th and 7th *July* 1724.—Conveyance by lease and release from Lord *Lonsdale, et alias*, to *Christopher Crowe, Esquire*, of all those tithes of hay and *herbage*, with all and singular their rights and appurtenances yearly, &c. in *Ellerton*.

Depositions

main question, where all the cases on the point are cited, is given in a note to that part of Mr. *Baron Wood's* judgment where it is mentioned.

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The Court, not coinciding in opinion on all the points of the case, delivered their opinions *seriatim*.

RICHARDS, Baron. As all these causes depend on the same evidence, and several of them on nearly the same points, it may be convenient to take them all at the same time. There has been, in each case, a great mass of evidence gone into, very much of which might have been dispensed with, not bearing very materially on the question. In my view of it, therefore, I shall apply myself wholly to the consideration of its general result.

Depositions and decree in a cause, "*Anthony v. Smithson.*"
 (The part for the sake of which the decree was produced, is transcribed in the judgment.)

24th January 1638.—Inquisitio post mortem, finding that *Roger Lawson* died, seised "De et in manerio de Burghe
 " juxta Catterick in Com. Eboracensi, ac de et in omnibus
 " illis decimis granorum et feni in Catterick et Burghe par-
 " cellis terrarum et possessionum, nuper monasterii beatæ
 " Mariæ juxta muros civitatis Ebor. quondam existentibus, ac
 " de et in omnibus illis decimis in Moulton Gilling alias
 " Killing et Forseth in dicto Com. Ebor. et in Catterick
 " predicto vocatis Beggarie tithes infra archidiaconatum de
 " Richmond nuper prioratui de Beggarie ibidem, nuper dis-
 " soluto spectantibus vel pertinentibus."

26 February 1638.—A demise by the king of the third part of the same tithes, (described in the same words,) to *Cuthbert Hearon*, (being in his Majesty's hands by the minority of *Henry Lawson*, brother and heir of the said *Roger*,) during his (*Lawson's*) minority.

. There

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ere claimed, and there was a decree for
rally. It may be said that that suit was
le to the township of *Kipling*; but
istment tithe in any part of the
it as endowed. A vicar having
ged of small tythes, and none
be enjoyed by any one else,
on is necessary; and therefore,
ent not having been actually received
does not in any manner prejudice the
d's claim. Agistment *de nomine* has not
en paid generally till of late years. I remember
its being first demanded in one part of the country,
and I advised the claim. Proof of an endowment
of the small tithes, has been held sufficient to sup-
port a demand of agistment, although it has never
been received before. Now in this case an en-
dowment is proved, and no title to any small tithes,
either by perception or otherwise, is shown to be
in any other person.

But it is said, that in one of the grants from
the Crown, as to one part of the parish, the word
herbagem is used, and that it must mean agist-
ment. Now I think that a word of very equivocal
meaning, inasmuch as it may mean grass or hay;
yet I do not think it can be construed to mean
agistment in any instance; and therefore, I think,
there is no distinction to be made on that account
as to that township. Whatever may be the true
meaning of *herbagem*, there has been no percep-
tion of this species of tithe proved to have been
enjoyed

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enjoyed under that word; and therefore I think the plaintiff entitled to it.

As to *Greenbury Grange*, and the township of *Killerby*, there is no difference of opinion in the Court. We think there should be an inquiry in both these cases; and therefore issues must be directed. But except as to those two, I am disposed to decide for the plaintiff, on the whole bill.

It may be said, that we should wait till these questions are tried, before we come to a final decision, however clear we may be as to the rest of the parish, and that the bills should be dismissed, if the verdict should be against the plaintiff on those issues; but that is a novel opinion to me. I never understood, that if a plaintiff does not succeed in his claim as largely as he lays it, he should therefore fail as to the part he proves. If a vicar demands tithe of a whole parish, and establishes his right only as to three parts, I have always understood, that the bill should only be dismissed as to what he does not prove. I know no way of answering so new a proposition but by stating it, for I know not on what ground it rests. I think, therefore, there should be a decree in favour of the plaintiff, for tithes throughout all the parish except *Killerby* and *Greenbury Grange*.

WOOD, *Baron*. I much regret that I again differ from the rest of the Court, as I fear I shall in other cases. (*Having stated the bill and answer, in*
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Byam v. Lawson.) The plaintiff's right to agistment is the only question between the parties in this case; and here a preliminary objection arises. I take it a vicar is bound to make out a title in all parts of a parish over which he claims generally; and that if he do not, his bill should be dismissed. On that ground, I think he has failed; for in *Kil-lerby*, which is one of the divisions of this parish, where he has stated himself to be entitled to tithes in kind, it turns out that he is entitled only to a money payment. The bill, therefore, I think, fails altogether. Then what is the defence set up? As far as relates to the township of *Ellerton*, there is a clear title to the tithe of hay and herbage made out by Mr. *Crowe*, and there also he has failed. He has failed too as to *Greenbury Grange*, which is proved to have been originally part of *Fountains Abbey*, and so exempt in the hands of the owners, which the two defendants, *Fawcitt* and *Outhwaite*, are. Although a rector is entitled of common right, and it is, therefore, not necessary for rector or vicar to prove title to all titheable matters; yet it is quite different, as to stating his title. In *Button v. Honey* (b), an objection was taken, that the plaintiff had not set forth how he was entitled, which was over-ruled, because the defendant admitted him to be vicar, though the report says it had often been ruled contrary, it being the ground and foundation of the plaintiff's bill. I cite that case to show that the Courts have not considered the stating a plaintiff's title in his bill, to be mere matter of

(b) Hard. 130, and Gw. 511.

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form. Endowment is constantly proved, I admit, by perception; and even a subsequent endowment may be proved by usage, but it must be proved as laid; and therefore, if a plaintiff lays his claim throughout the whole parish, and proves it in some parts only, he fails altogether. If a prescription at law is not fully proved, it fails; it is therefore not matter of form. If a partial right be claimed, the evidence must be confined to that part. If a general right be claimed, a partial proof will not support it; for evidence in part is not good, if the claim be general. Here evidence has been received in parts, that did not affect *Killerby*, because the claim is general, and extends over the whole, although the plaintiff has failed in proving the whole. If he had only claimed in *Killerby*, he could not have given evidence as to other parts of the parish. It is not necessary to cite cases as to the rule at common law; but I will mention those of *Mitchell v. Mortimer* (c), and *The King v. the Inhabitants of Hermitage* (d), which establish it clearly.

I think the vicar should have excepted *Killerby*, and the other townships in which he has failed; and if not originally, he should have amended his bill after answer. If an issue had been directed, the jury must have found against him. It is said, a judge may endorse what is proved. I cannot tell how that may be; it must depend on circumstances. It may be said, greater laxity is allowed in Equity, in laying a claim, than in common law

(c) Hob. 209.

(d) Carth. 241.

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pleadings. I know it is so, in fact ; but the title laid must be proved, otherwise the whole bill might be read hereafter, as proof of a general right through the whole parish. The objection which was made in *Travis v. Challoner (e)*, has a strong application. The plaintiff, claiming tithes in kind in certain townships within the parish, alleged in his bill, that he was entitled, as vicar of the parish, to the tithes in question, in those townships ; which he attempted to support, by proof of the payment of tithes in all other parts of the same parish : and the objection taken by the Court was, that it was evidence of a general right, whereas the allegation was of a particular right ; and that thus the defendant might be misled in his defence. The Court, therefore, thought, that what was the case as to other townships, was not evidence generally, so as to affect the particular townships for which tithes were sought. In the case of *Leigh v. Maudsley (f)*, from *Bunbury*, the Court said, that a defendant might, in Equity, insist on several defences which are consistent ; yet, having undertaken to prove a general exemption, by failing in that, he cannot have the benefit of the other points. Although that was the case of a defendant, the reasoning is equally applicable to that of a plaintiff. As it regards the evidence also, the mode of laying the prescription becomes very material. In the case of the *Earl of Clanrickard v. Lady Denton (g)*, where a custom was alleged, that all the owners and proprietors of any coppices or woods in the weald of *Kent*, should be discharged of tithe for all manner of wood : such a

(e) 3 Gw. 1237.

(f) 2 Ib. 703.

(g) 1 Ib. 360.

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general allegation, if permitted, would have the effect of excluding the testimony of any one entitled to be discharged from payment of tithes for any wood within the weald, although they should have no interest in the question, as to the particular part in dispute between the parties to the suit: and so it would be (it is said) in the case of a common, if the right be alleged in a whole vill, and in the case of a modus, so laid. Now to apply the doctrine of that case to the present, the general mode of alleging title to tithe through the whole parish, would, as in the case of a general prescription, exclude all parishioners as witnesses for the defendant. And thus an undue advantage would be gained by a plaintiff laying it too largely. The manner of laying the title, therefore, makes a great difference in point of evidence, and might be made the means of promoting the most manifest injustice. Therefore, my opinion is, that as in all the suits the title is laid too largely, the bills should be, for that reason, dismissed; or at least suspended till the issues have been tried. As to *Killerby*, there must be an issue; and I think that the defence is proved, unless the vicar chuses an issue.

I will now examine, first, the vicar's general right; and secondly, the circumstances. It seems, there had been an endowment before the time of the taxation of Pope *Nicholas*, in 1291, for the vicarage is noticed in that document, and valued at 13*l.* 6*s.* 8*d.*; and it is stated to pay an annual pension of 13*s.* 4*d.* to the abbot and convent of *St. Mary's*. But as no endowment has been produced,

duced, we can only collect of what tithes it consisted, by evidence; and it is plain it was not endowed of all tithes originally, as appears by the act of archbishop *Zouch*, in the year 1344. It is argued, that though those tithes then belonged to the monastery, there must have been a subsequent endowment.

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The next evidence for the vicar, is the Ecclesiastical Survey. "Hay" is mentioned there as belonging to him; but it is clear that hay was not his: so that shows these ancient documents are not very correct. Then "minute and privy tithes" are mentioned, amounting to 6*l.*; but does that show that he is entitled to all small tithes? He is only entitled, according to that document, to those in the *Easter Book*, and what those are we know not. The Ministers Accounts, 31 *Hen. VIII.* have '*pro quobusdam decimis*,' still leaving it in the dark as to what tithes. All the proceedings in the cause in the Exchequer, are dragged in by the mode adopted of laying the title*. The wool tithe there decreed can be no evidence of agistment being due. In *Garnons v. Bernard*, those tithes are treated as paid *diverso intuitu*. The evidence of *Atkinson*, of payment for turnips eaten by barren cattle, for twenty years, is a mere modern matter, and by no means sufficient to establish a general right.

* *Anthony v. Smithson*, before referred to. By the decree which was made in that cause, it appears, that amongst the tithes scheduled, as sought by the plaintiff's bill, is one for "sheep sold with their wool, before they were clipped, for which monthly tithe is due,"—an expression much relied on for the plaintiff.

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Then as to *Ellerton*, the defence is, a title under the Crown to hay and herbage; which I am clearly of opinion, must be taken to include agistment. No payment to any one is shown, and retainer is equivalent to actual possession, where the same person is owner of both tithe and land. The lease to *Sandys* is, of "hay and herbage;" and can it be supposed the vicar was then in the enjoyment of agistment? It is, on the contrary, excessively clear, that the vicar was not. The grant by letters patent to *Phillips* and *Moore* is, of "all the vicarial tithes of hay and herbage in *Ellerton*," reserving a rent in fee of 6s. 8d. for hay and herbage; and that has been always paid up to the present time, and is now paid. In a marginal note to the accounts of the collector, in the 10th *James*, these tithes are called *decimæ feni* only; and it has been urged, therefore, that *fenum* and *herbagium* mean the same thing; but the grant says both, and so does the conveyance of 7 July 1724 to *Crowe*, the purchaser: how then can a marginal note, which generally refers to the principal object of the document, make any difference? The bargain and sale is, of "all that the manor of " *Ellerton*, and also all those tithes of hay and " herbage;" and from that time they have been in the family of the same person: a clear title, therefore, is made out to hay and herbage, in the family of *Crowe*. As to *fenum* and *herbagium* being the same, there is no foundation for such an assertion. They are distinct tithes, though, being of the same nature, and both predial, it is natural that they should go together. The words are,

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scenum et herbagium, and are called, in the plural number, "all those tithes." Hay, is grass mowed; herbage, is grass not cut, but eaten by barren cattle. In *Ellis v. Saul* (*h*), the then Chief Baron *Eyre* says, 'agistment tithe is the tithe of herbage, not 'of the cattle.' *Herbagium* is sometimes called herbage, and sometimes agistment. Lord *Coke*, in his *Com. on Stat. Ed. VI.* says,—“for barren beasts, “he (the parson) shall have tithes for agistment or “herbage.” We may shut our eyes to the light, but *herbagium* must mean agistment. The evidence in this case shows it beyond a doubt. The receiver of the Crown rents answers for tithes of herbage or agistment of the farm, showing that it means the same thing. In the Ministers Accounts, under the head *spiritualties*, “herbage in the castle-yard,” is spoken of; and can that be hay? We have “*decimæ fæni*,” in some of the documents; “*decimæ herbagii*,” in others. There is, therefore, a manifest distinction. When we find “*omnes illas decimas nostras herbagii unius pasturæ sive clausi*,” as we do in the second grant of *Kipling*, there can not be a doubt of the meaning.

Let us now look at the authorities: besides the case of *Ellis v. Saul* (before referred to,) and the exposition of Sir *Edw. Coke* (*i*), in *Greene v. Austen* (*k*), it was held, that the tenant, having paid tithe of hay, was discharged of agistment tithe for that year; and in *Fox v. Adye* (*l*), it is called

(*h*) 4 Gw. 1326.(*i*) Page 651.(*k*) Yelv. 86.(*l*) 2 P. Wms. 521.

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tithe herbage of dry and unprofitable cattle. So also in *Guilbert v. Eversly* (m), and *Tamberlain v. Humphrey* (n). These authorities are abundant proof to show, that agistment and herbage mean the same thing; and that is established by all the cases in *Gwillim* from beginning to end.

It has been said, that the grants of the Crown do not convey agistment, for that the Crown had it not to grant; but that is a strange objection to be made by a vicar who proves no endowment, or even perception, till within the last twenty years. Why had the Crown no title? It is said, because the vicar was endowed before the dissolution; but how is that made out? It is very clear the tithe devolved on the Crown, and the Crown has granted it to *Crowe*; who becomes thereby, in fact, rector, and represents the abbey, and may therefore stand on his common law right. It is also argued, that the vicar must have been endowed of small tithes generally, and that that includes all tithes of modern introduction. I agree that one case has gone so far, that is the case of *Kennicott and Watson**; but

(m) 2 Gw. 502.

(n) 4 Ib. 1345.

* SITTINGS AFTER HILARY TERM.—54 GEO. III.

SERJEANT'S-INN-HALL.

KENNICOTT v. WATSON and others.

A vicar, proving perception of small

THIS bill was filed by the vicar of *Woodhorn*, in the county of *Northumberland*, against the defendants, occupiers of lands within

but there the defendant did not prove himself entitled; whereas here, I think, the title to agistment is made out to be in the defendant.

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within that parish, for an account of tithes of agistment, turnips, and potatoes; founded on the plaintiff's title to all other small tithes throughout the parish.

The defendants, in their answer, admitted that the plaintiff was, as vicar, entitled to tithe of hay, and certain small tithes in kind, or *sub modo*; but they all denied his alleged right to tithe of agistment, turnips and potatoes, and all other tithes not theretofore rendered; and to those they set up a title through the Crown, or its grantees, of the impropriate rectory, insisting, that they were become vested in the owners of the land. The defendants, *Watson, Potts, and Jackson*, set up a modus also, of 7s. 4d. in lieu of tithe of hay, hemp, flax, and rape, in the township of *North Seaton*. The defendants, *Pattersons*, a modus of 3s. 4d. in lieu of tithe of hay on a farm called *Blakemoor*, in the township of *Creswell*. And the defendant, *Smith*, a modus of 1l. 7s. 8d., in lieu of tithe of hay, and all small tithes, on a farm called *High and Low Horton*, in the township of *Horton*. The bill was afterwards amended as to all the moduses, except *Smith's*.

In support of this bill, the plaintiff put in the following documentary evidence:

1st. Taxation of Pope *Nicholas*, in 1291. "Woodhorne Rectoria, 75l. Vicaria ejusdem cum capella de Horton, 50l. Portio de Prioris in eadem, 4l. 18s. 3d."

2dly. Ecclesiastical Survey of 26 Hen. 8. "Woodherne Vicaria valet clare, 21l. 15s. 8d."

3dly. Ministers Accounts, 32 Hen. 8. "Compus Willmi Grene Collectoris firmaz ibm p tempus p'dm. Woddern Rectoria.—Et de Cx^a de firma granoꝝ decimalli

tithes (where the Crown, and those claiming under it, have never received or dealt with other tithes than those of corn and grain,) held entitled to demand tithes of agistment, turnips and potatoes; although such tithes have never before been received by his predecessors; and that, although the documentary evidence adduced in support of the vicar's claim refer to "small tithes," and not "all small tithes;" and although it appear that a pension or portion is payable out of the vicarage to the superior.

Semble, there must be an express grant of such small tithes to the impropriator, or an express them by other

exemption of them out of the vicarage, or an actual perception of persons proved, to take away the vicar's right.

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Greenbury Grange, derived down to the defendant *Fawcitt* from the privileged order, is therefore exempt.

malii p granis crescent: in anno Regis Hen. viij. xxx^{mo} sic dimiss: Johñi Cooke p indent. dat. xvj. die Julii anno R. R^s Hen. octavi xxx^{mo} p termino xxi annoꝝ solvend. ad terminos Sci Martini & puř. Bte. M. Virg. p equales porçones D. vj. f. de firma granoꝝ decimaliũ. Villa de Wetherington p granis crescent in Authumpno anno xxxj^{mo} hic non respondit, eo quod inter alia dimittit Thome Hilton Militi cum firma terř dominical put in dco com̃po Firmarii plene liquet.

[The same excuse was returned for each of the other townships]. Pençones et Porçones.—Sed de f. iij. xij⁴. iij⁴. de annuali pençone exeunt de Vicaria de Woodherne p antiq̃m composiçonem solvend. ad terminũ p̃d̃m hic non respondit eo quod Thomas Burton Clericus Vicarius & Incumbens ibm ptulit coram Commissionar⁹ Dom. Reg. super surreddiçonem Monasteriũ p̃d̃ci diṽsas escript^s sive composiçones sigillo Ep̃i Dunoll. coroborat inspectq̃ tenoř eozd̃m evident patet quod Vicaria de Woodherne consistere debet t̃m raçone primar⁹ ordinaçonis q̃m confirmaçonis ejusdem in quinquaginť març sterling et non ultra et si aliq⁴ emolument sive pficum pvenienť de exit decimar ibm p d̃cm Vicař recepĩ ultra p̃dcam summã quinquaginť març emiserit aut in exit ejusdem Vicař annuatim crescere contigerit ad pprietarios spectabĩ. Et q̃ d̃cũs Vicarius in minuť decimar et alioř pficũ ad eandem nuper spectant ex minima decasu inhabitant villař ibm dict Vicař ptineñ et incolař & mercatoř ibm nuper inhabitant adeo minorať sunt qđ totis exit pficua d̃ce Vicař nunc spectant non attingit ad summã quinquaginť març ut pfertur considerať est p com̃ar p̃dict qđ p̃dict annual pençõ respect quousq̃, &c.

4thly.

exempt. There may be a doubt as to the extent of the Grange, but that can be ascertained by an issue.

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4thly. Grant of 24 May, 7 Jac. 1st. to *F. Morrice* and *F. Phillips*, de omnes illas decimas nostras gronorum annuatim et de temp. in temp. crescē, &c. infra villat. & campos de Woodhorn;—and so of the same tithes in each of the other townships in the parish.

5thly. Parliamentary Survey, *A. D.* 1654. "The parish of *Woodhorn* is a vicarage, unsupplied with a vicar, worth 68*l.* per annum.—Impropriation in the hands of the *Mercer's Company* in *London*, worth 100*l.* per annum.

6thly. Receipts of successive vicars for 7*s.* 4*d.* in lieu of tithe hay, hemp, and lints, for *North Seton*, from 1701 to 1778; and fish and hay moduses, and tithe compositions, for *Blakemoor* estate, from 29 September 1752 to 1800. Leases by *Hen. Latton*, vicar, of all the great tithes of the several townships of *East and West Hartford*; and all and every the petty tithes, moduses, &c. charged upon the lands belonging to the chapelry of *Horton*. An account book, referred to in defendant *Smith's* answer, kept by *Robert Smith*, the last lessee under *Latton*, entitled, *Hartford Tithe Account*, commencing in 1783, and ending in 1788. And three terriers; the first of 20 December 1663, describing the glebe only; the second of 5th July 1788, specifying the glebe, as in the former, and the compositions, moduses, and tithes due to the vicar, and noting that turnips and potatoes are refused; the third, of 5 August 1792, describes the vicarage-house, states the glebe to be 85*A.* 12*P.*, and enumerates various small tithes.

By the depositions read on the part of the plaintiff, it appeared, that *High and Low Horton* were two distinct farms, and occupied by two distinct tenants; that the occupier of *High Horton* had paid no tithes, but a sum of 1*l.* 6*s.* in lieu of tithe, and that the occupier of *Low Horton* paid 9*s.* in lieu of tithe; and that the average yearly value of the tithes of calves, wool, lamb, pig, geese, and hens, was about 2*l.* for
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issue. As to the other townships, I say, that a clear title not being made out to *Killerby*, the claim,

High Horton ; that in some parts of the parish, tithe of turnips and potatoes had been paid.

The evidence on the part of the defendants was, that no tithe of agistment had ever been paid ; and that the vicar had said, on one occasion, that he was not desirous of receiving the tithe of potatoes.

Dauncey, Whetherell, and Simpkinson, for the plaintiff, admitted, that a vicar must make out his title to tithes in one of three ways ; by endowment or grant : if neither could be produced, he must give evidence of its existence and contents : or he must make out a possessory title by usage or actual perception, which presumes an endowment. That there was a vicarage, and that it was endowed, is clear from the documentary evidence. The Ministers Accounts are peculiarly favourable to the plaintiff's claim ; they show that nothing was claimed by the Crown but corn and grain, and that the whole was let to *Sir Thomas Hilton* ; and if agistment, or any tithes beside that of corn and grain, had been reserved, it would have been noticed there. Turnips and potatoes, indeed, were not then introduced into this country ; and it would be a gross anachronism, to contend that such tithes had passed from the Crown to the terre tenants, as suggested by the defendant's answer ; agistment, though an ancient subject of tithe, has not been rendered in the north till of late years ; they could not, therefore, have passed from the abbey to the Crown. The second part of this document is not only evidence of the endowment, but also of its contents. It states, " that a pension is payable out of the vicarage ; which, it appears by inspection of divers writings, ought to consist (as well by reason of its primary ordination, as of the confirmation of the same,) in fifty marks sterling, and no more ; and " if any emolument or profits arising from the issue of the " tithes there, by the said vicar, shall happen, beyond the " said sum of fifty marks, it shall belong to the proprietors." And

claim, (being extended over the whole parish, and of course including that township), is too large ; and therefore

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And however unintelligible this part of the document may be said to be, it is clear from it, that the small tithes were payable to the vicar, whatever part of them he was entitled to retain ; and even if he had himself no right to more than fifty marks, it is a right conclusion that the vicar was to have all the small tithes. It cannot be said to appear by this, that all that belonged to the vicar was fifty marks, payable out of the tithes due to the rector, for it sets out with stating the pension as issuing out of the vicarage. The taxation of Pope *Nicholas* corresponds with it. And the grant to *Morrice* and *Phillips*, who were vehicles of the Crown, for the purpose of sale, corroborates this view of it, for it grants the tithe of corn and grain only. It is plain the vicar receives the tithe of hay in all the townships except *Cowpon* ; and where hay is given, agistment is never kept back ; no one ever saw such an endowment. The Parliamentary Survey estimates the vicarge at 68*l*., more than double fifty marks ; and the impropriation there stated to be in the hands of the *Mercers Company*, is estimated at 100*l*. The Crown, the Commissioners, and the *Mercers Company*, claim no more than the tithes of corn and grain ; and there is not an instrument, or any other evidence, of a claim of any of the small tithes of the parish by any other person. It must be argued then, that these documents prove endowment ; and the documents, aided by the usage, prove the endowment to be of all small tithes. As to the *Smiths*, they set up a modus of 1*l*. 7*s*. 8*d*. for a farm called *High and Low Horton*, one entire sum, for one entire farm. Whereas the plaintiff's evidence shows the farms to be distinct, and the sums distinct, and absurd in the amount proved by us ; 1*l*. 6*s*. and 9*s*. were the sums forty-four years ago, i. e. 1*l*. 15*s*. ; what becomes then of the antiquity of the modus of 1*l*. 7*s*. 8*d*. paid since ? Though in an answer, you need not describe the boundary of a farm, pleaded to be covered by a modus, with perfect accuracy, yet you must show that the farm was known, and was ancient ; but here there is no character of identity given it. Then as to the usage, perception by the plaintiff of all small tithes,

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therefore the plaintiff fails ; and in that township there is a modus clearly proved ; so that no tithe in kind

tithes, except agistment, and turnips and potatoes, is in evidence.

Fonblanque, Martin, Hall, and Meggison, for the defendants, contended, that whatever the testimony might be, the fair result of the evidence was, that the vicar was not entitled to all the small tithes ; and it was on proving himself entitled to all, alone, that he could succeed. *Prima facie*, the rector is entitled, and a vicar must make out his title clearly, and independent of presumption, in his favour. What is not proved to be granted by the rector, cannot be considered out of him ; and as tithe of agistment has never yet been paid, (for that is a fact established by all the evidence,) the fair conclusion is, that the vicar has no title to demand it, and that it still belongs to the rector, whoever he may be. The documentary evidence, which is in all cases considered inconclusive, and, as held by Lord *Hardwicke*, will not destroy a modus, does not prove enough for the vicar. It only proves, that corn and grain were granted to Sir *T. Hilton*, not the rectory ; and if agistment were not intended to pass, it remained in the Crown. And as to the usage, the perception of all small tithes has not been shown. For, not to mention the tithes in question, the vicar has not shown that he ever received the tithe of milk, orchards, and other vicarial tithes ; and all the cases go on his being entitled to all the small tithes. The endowment was to amount to fifty marks, and no more, as appears by the minister's accounts ; and all received beyond, must have been paid over to the proprietors.

[*GRAHAM, Baron*. How do you reconcile that with what has been received ?]

GIBBS, Chief Baron. The document assumes that the vicar was in the receipt of the tithes ; the vicar was not, therefore, to receive a dry sum of money, but tithes, to whomever he was to account for the residue in money.

If

kind is due or could be claimed. As to *Greenbury Grange* he also fails, although he claims an unqualified right ;

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If a conjecture might be hazarded, the vicar [probably received the tithes beyond that sum, on account of the rector, and the rectory is certainly yet in the Crown ; for what was granted to *Morrice* and *Phillips*, was corn and grain only, and not the rectory. Our evidence is, that no such tithes have ever been paid ; not in *non-decimando*, but to disprove the right of the vicar. The terriers speak of some certain small tithes, but make no mention of all small tithes. As to the defendant, *Smith*, the occupier of *High* and *Low Horton*, though his defence is a *modus*, he is not precluded by having set up that bar, from objecting, in this stage of the cause, to the vicar's title (a). Now he has produced no endowment ; not that it does not exist, but he may probably do better without it : nor is there any evidence of the articles of which the alleged endowment consisted ; it might have been of glebe alone, of pension alone, of tithes alone, or of all ; but we cannot presume of what. The first terrier shows it consisted of glebe alone ; the second adverts to the ecclesiastical rights, *moduses*, and tithes, where due ; but the terriers are all unsatisfactory. And if the title rest on usage, that cannot avail the vicar, at all events, as to *Smith's* *modus* ; and usage against endowment, may even take away the right of a vicar. The Court, at least, will not decide in so doubtful a case, in the absence of the rector, without a trial at law. *Charlton v. Charlton* (b) ; *Garnons v. Barnard* (c) ; *Travis v. Oston* (d), twice decided here. If the rector should sue the next day, we could not plead that decree.

[*GRAHAM, Baron.* I do not remember an instance of calling for the rector, when it did not appear that the rector claimed. Every endowment must be proved against a rector, certainly.]

(a) *Cost v. Bell*, 3 Atk. 497.—3 Burn's Eccl. Law, 401.

(b) 2 Gw. 715.

(c) 4 Gw. 1462.

(d) 3, 4 Gw. 1566, 1293.

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right; and therefore, I think that each of the bills should be dismissed, unless he takes issues; and that if he should fail in any one, he must fail in *toto*.

GRAHAM,

The *modus* is well laid, and even if it should turn out to be not precisely proved as laid, yet, where there is such reasonable ground for a *modus* as here, there can be no decree in Equity (*d*). The evidence of the *modus* is not broken in upon in more than two instances. It is said, they have destroyed the entirety of the farms; but they have only proved that they were occupied by different tenants, not that they belonged to different owners. One *Deval* is stated to be the landlord of one part, but it is not said who was the landlord of the other part; and it lies on the plaintiff to prove that. But even if we fail in strict proof of our *modus* as laid, it is by their having proved another for us; and that is a sufficient ground for a Court of Equity refusing to grant a decree of tithes in kind, where there is so strong evidence of the existence of a *modus*. *Scott and Fenwick (e)*; *Elkins v. Dormer (f)*.

Dauncey, in reply.—The defendants rely, that the tithe of agistment, and turnips and potatoes, not having been proved, *nominatim*, to have been rendered to the vicar, they therefore remain in the rector, against whose right, in his absence, they ask the Court not to decide. Our evidence is, that these tithes do not remain in the rector; for each portionist of great tithes, and the *Mercers Company*, in whom the impropriation is shown to be, are confined to corn and grain; and the bailiff's return, which takes notice of both rectory and vicarage, speaks of the small tithes; and there is no real difference between 'the small tithes' and 'all small tithes.' If we had no documentary evidence, the parol testimony would have been sufficient for our case. It is said, an endowment may be altered by usage; it is true, it may be diminished, but it may also be increased. Our

(*d*) *Webb v. Beal*, in *notis*, 1 Gw. 131.—*Cotes v. Walker*, ib. 172.—*Brook v. Richardson*, ib. 1303.

(*e*) 3 Gw. 1250.

(*f*) 2 Ib. 800.

documentary

GRAHAM, *Baron*. I shall confine myself to the result of the complicated evidence produced in these

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documentary evidence, the leases, and receipts, and the depositions, speak of the small tithes. The lease to *Smith*, the father, is of "all small tithes;" and, by the moduses set up, particularly by *Smith's*, they admit our title to every species of small tithes; and the occupier certainly cannot avail himself of the special nature of this endowment; for, whether the vicar is to have only fifty marks, or more, the occupier must pay the tithes to him, and it cannot concern him to inquire who is entitled to the rest. They say the Ministers Accounts show, that all beyond that sum is payable to the proprietors; but, by proprietors, may be meant the vicars themselves, for, as far as regards their endowment, they stand in *loco rectoris*. Actual payment of the tithes in question, by *Swann*, for nine years, is in evidence. The cases which have been cited, do not in the slightest degree bear upon the present; they relate chiefly to questions of jurisdiction. In *Garnons v. Bernard*, the question was between the rector and vicar, on perception of agistment tithe; and there, it is true, a trial at law was held necessary to establish the fact.

Smith's modus is overthrown, by our having proved the farm, by them alleged to be single, to be two distinct farms; the tithes for which were paid for, prior to the time of the payment of the supposed modus of 1 *l.* 7 *s.* 8 *d.* by them, in sums exceeding together the amount of that modus; but then they say, that by having proved such payments, we have set up such a probable ground of modus for them, as will preclude us from a decree of tithes in kind, and entitle them to an issue. But the facts of the cases cited by them in support of that argument were not similar to those of this case. There the moduses were brought forward by the plaintiff; here the passages in the depositions were read by the defendants, notwithstanding our objecting to them. And there too the moduses were proved to have been immemorial payments, which these do not appear to have been.

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these causes, and observe on the prominent parts.—
As to *Byam* and *Booth*, there exists no difference
of

GIBBS, *Chief Baron*, this day delivered the judgment of the Court. Having stated the case, he proceeded as follows :

The original bill having been amended, as to all the moduses except *Smith's*, the claim is reduced to the tithe of agistment, turnips and potatoes only; *Smith's* modus is, however, still denied. The defendants all negative the vicar's title to those tithes, and *Smith* says further, if he can make out a title, I can also prove a modus of 1*l.* 7*s.* 8*d.* There certainly can be no presumption entertained in favour of the vicar; he must prove his case. A rector is *prima facie* supposed to be entitled, but it is directly the contrary in the case of a vicar; his title can only be shown by endowment, or perception, which will be admitted to supply the want of endowment; and where it appears, that he has uniformly received all the small tithes, there can be no difficulty in his making out his claim. But the cases have gone further, deciding, that where a title is made out by the vicar to all small tithes, he is entitled to whatever tithes are legally of that description, although not before paid; and where tithes of modern introduction, or other small tithes, have not been received, it will be presumed it was because no occasion occurred. It has been again and again determined, that tithes of modern introduction are vicarial tithes; that is the case of turnips and potatoes, and though of field cultivation, they are still such. Agistment is also a tithe which was not rendered in the North till lately. *Fitzherbert's Nat. Brev.* has an authority, that tithe of agistment is not due. (Ch. Writ of Consultation, No. 53, Letter G. and also the marginal notes.) The marginal notes are Sir *Wadham Windham's*, those at the bottom are Sir *Matthew Hale's*. But that must mean agistment of profitable cattle; without that explanation, such an authority is calculated to mislead. If then we find a vicar receiving small tithes, and no one else receiving any portion of the small tithes, it is to be presumed he is endowed of all (*g*). Some cases go further, where the

(*g*) *Clarke v. Stapler*, 3 Gw. 926.—*Cartwright v. Bailey*, 3 Gw. 938.—*Jeremy v. Strangeways*, 3 Gw. 1173.—*Payne v. Powlett*, 3 Gw. 1247.

rector

of opinion; a *modus* of 4*l.* is proved, as laid, for all manner of tithe payable to the vicar; and I think there

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rector has received some small tithes, and the vicar all the others; and a mistake may account for the rector's receipt.

Now the first question here is, has the vicar shown that he was endowed of all the small tithes? If so, though not rendered to him, yet, not having been received by any one else, he is entitled to demand them. The evidence, then, is next to be considered. The first document is the taxation of Pope Nicholas, in 1291: "Vicarage of Woodhorn, 50*l.*;" and this is produced, to show, principally, that the vicarage was then endowed: but it also states, "*Portio Prioris de Tynemouth in eadem.*" Whatever this was, it was payable out of the vicarage; it cannot, therefore, refer to any thing of which the vicar was not endowed: for instance, if he had been endowed of all small tithes, except agistment, turnips, and potatoes, they would not have been a charge on the vicar, but excepted. Then we have the Ecclesiastical Survey of 26 Hen. VIII.; by which it appears to have fallen to 21*l.* 15*s.* 8*d.* The next is, the Ministers Accounts of 31 Hen. VIII., the year after the dissolution of the monastery to which this living belonged. That document it is material to attend to, for it is almost impossible that any thing should have passed out of the Crown in that short period. In those accounts, tithes of corn and grain only are accounted for by the minister. They are stated to be in lease to Sir Thomas Hilton; and there is no mention any where made by them, of any of the small tithes being due, which is a very strong argument that nothing of that sort was in the Crown. The leases to Hilton are also produced; and there is no mention of any small tithes there. Pensions and portions are also mentioned in these accounts,—"*de annuali pensione exeunte de Vicaria de Woodhorne.*" The same observation that I made on the taxation of Pope Nicholas, applies here; the difference of the amount is not material. *Minutæ decimæ* are afterwards mentioned. Those words not only include all small tithes, but

they

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there is such evidence of long continuance of that payment, as requires an issue. So in the last cause, the

they also show, that the attention of these officers was called to small tithes; and they could not have omitted to mention them, if any part belonged to the Crown. The wording of this document has been the subject of much criticism, but it has not rendered it clearer. Some parts of it, however, are sufficiently clear, and show that the rector was entitled to the pension only. The excuse of the bailiff is, that the farm of the grain-tithes had been demised. It has been argued, that the vicar has been shown by these accounts to have had only fifty marks, and that the rest was in the rector; but it is impossible to reconcile that argument with any part of the document. The most disadvantageous construction which I can give it against the vicar is, that he is accountable to the rector for the excess; though I do not say that that is the construction: but if it were, he would be, in that case, entitled to receive all the tithes, and would be accountable in value, not in kind, for the excess; for you could not divide these tithes, and say which should receive carrots and which potatoes: so that, be that as it may, the Vicar would still be entitled to all he seeks. The grant to *Morrice and Phillips*, shows that nothing but grain was its subject. The Parliamentary Survey of 1654, states the pariah of *Woodhorne* to be a vicarage, unsupplied with a minister, and worth *per annum*, three-score and eight pounds; and that the impropriation is in the *Mercers Company*. As to the rest of these documents, it appears from them, that neither the Abbey, the Crown, nor the persons deriving title under the Crown, had ever claimed the small tithes; and thus they show that the vicar is entitled. But then what is the evidence of usage? for an endowment may even be altered by usage. Now let us see how this is. We have the vicar's receipts; those relating to *Blakemoor* are for fish and hay moduses, and for certain other small tithes. These, and the receipts for *North Seton*, from 1701 to 1778, show the vicar entitled to small tithes, and also to tithe of hay. Then we come to the leases of the vicarial tithes: that of the 17th November 1783, is of "all and every

the defendants have made out their case. We all think there is something of a claim as to *Greenbury Grange*,

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every the petty tithes," for five years, to *Robert Smith*, the father of the defendant *Smith*; but at the expiration of two years, that is in *November 1785*, a new lease is granted to him by *Latton*, the vicar, for ninety-nine years, if he should so long live; his acceptance of which is an extinguishment of the first lease. The tithes, which are, in part, the subject of these leases, are expressed to be payable out of lands in the chapelry of *Horton*, where *Smith's* lands and *Swann's* lie. From the tithe-book, kept by *R. Smith*, he being now the lessee of the vicar, it appears he uniformly, from 1783 to 1799, received all the small tithes. This book speaks of the vicar's title to all small tithes, and not as to any modus for them. Then we have the depositions; and from them it appears, that the vicar received small tithes from all the different districts, if that were necessary to be shown. Then how does this case stand? From the dissolution, we find that the Crown, and those deriving title under it, have never claimed more than the tithe of grain; and that there is a pension payable to them, issuing out of the vicarage. That the *minutæ decimæ* were a part of the endowment there is very strong presumption; but when it appears that the vicar has been in the constant perception of all small tithes, except agistment, turnips, and potatoes, it puts the case beyond all doubt. *Mr. Hall* suggested, that the endowment was kept back; that was expressly denied, as far as his knowledge went, by *Mr. Dauncey*, and we cannot presume it. Several cases have been pressed on us by *Mr. Hall*, to get an issue. But that of *Charlton v. Charlton* (h) only shows, that perception must be proved by him who claims certain tithes; no doubt, except he be a rector, such proof does lie on him. *Travis v. Oston* (i) was also strongly pressed on us as a decision; but I think that it does not bear at all on the present case. Each Court was correct, in the view it took of that case; but which view the evidence supported, I do not enquire. The other,

(h) 2 Gw. 715.

(i) 3 Ib. 1066. 4 Ib. 1293.

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Grange, that may require investigation as to its extent. In that suit there are two defendants, who swear that they believe that the 500 acres which they hold were part of the abbey; and claim, by 31 H. VIII., the advantage of being exempt from tithes in the hands of the owner. They have given

some

Garnons v. Bernard (k), is wholly unlike the present case. There there was no pretence to say that the vicar was entitled to all small tithes. That was a contest between a rector and vicar, and proof was adduced of the rector having received tithe for lamb and wool; on which it was disputed, whether it was not for agistment, besides its being an immediate question between them alone, and the vicar not having all small tithes. We do not therefore meet on either of those cases; as the fair result of the evidence here is, that the vicar was entitled to all the small tithes, and the bill, as now filed, is for agistment, turnips, and potatoes. As to the evidence of the vicar having said he did not wish to take the tithe of potatoes, it was only a good-natured declaration, and cannot break in on any right. The title then being thus disposed of, including hay, which I think Mr. *Hall* was entitled to question, the next subject of consideration is the modus for *High and Low Horton Farm*, of 1 l. 7 s. 8 d. I do not now discuss, if the modus be properly laid; but it was indispensably necessary for the defendant to prove it correctly, whatever laxity might be allowed in laying it. But he rests on his arms, and tries what the plaintiff will do for him; and that evidence was untoward, for what was called one farm, turns out to be two farms: and it having appeared who was the owner of one farm, it lay on the defendant to show who was the landlord of the other. It also appeared, that two sums were paid, exceeding together the alleged modus. But Mr. *Hall* says, if I have not proved my modus, you have proved one for us, and so are out of Court. Now it cannot fairly be shown, that any such thing is proved. Therefore the plaintiff is entitled to the account prayed; but not beyond six years from the time of filing the bill.

Decree accordingly, with costs.

some evidence of the extent of the Grange ; though I think that the land must have been greatly added to in modern times : but that may be tried. These two parts of the case being dismissed, introduces the general question, and I cannot but be surprised that the objection taken has received the authority it has ; for I should have thought the course was too well understood. I have not sought authorities ; for no man ever heard of a rector's bill, where the plaintiff was to find out what moduses exist. He stands on his common law right. A vicar must show endowment or usage, but either may be within time of memory. Enjoyment is tantamount to an endowment ; but when that is once shown, he stands as a rector would, and has then a right to put the defendant to prove his exemption. If not, what would be the duty of a vicar ? he must go about to enquire whether any exemption exists, lest his bill should be dismissed. It is said, he may amend, when the answer comes in ; but by doing so, he would admit what could not, perhaps, be proved. Without looking into cases, this of itself satisfies my mind : the argument is not only perfectly novel, but contrary to my idea of right reasoning. This is quite distinct from proving a prescription at common law, where great strictness is required, both as to stating and proving it. If an occupier sets up a modus, he indeed must prove it as laid ; but a rector is entitled to put his right generally. What endowment ever mentions moduses or exemptions ? It lies on the party to prove them.

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We come then to the consideration of *Byam* and
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Lawson. The defendant admits the plaintiff's title, except as to corn, hay, and agistment; which latter he claims as a portionist, and says he is entitled under the portions payable to the abbot out of the vicarage.—(*His Lordship here went through the documentary evidence which mentions those portions.*)—Then a question arises, as to what species of tithe the portions were payable for; but whatever they were, they did not form the rectory; and therefore it was necessary that he should prove what they were. Had he brought an action, he must have done so, otherwise he would have been nonsuited. Now he and all his tenants admit that the vicar was entitled to all tithes, except agistment; that must therefore be expressly shown to belong to the rector. An impropiator differs from a rector in one material respect; for a rector may stand on his common law right, but an impropiator's title must be shown; and no proof is offered of his having enjoyed any tithe beyond corn, grain, and hay. The suit between *Byam* and *Crowe*, is confined to *Ellerton-upon-Swale*. The defence rests mainly on the dimission of Archbishop *Zouch*, in 1344.—(*Here his Lordship commented on the other documents, and stated that the result did not establish the object of showing the tithe of agistment in the defendant; he also intimated, that the word Catterick, in the act of Archbishop Zouch, might have crept in by mistake for Colbourne.*)—The case is thus reduced to the effect of the word *herbagium*, in the lease to *Sandys*, on which too much reliance has certainly been placed; for, down to 35 *Eliz.* there is no evidence

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evidence of any right in the Crown to agistment. I do not feel it necessary to go into the definitions of *fieni* and *herbagii*; definitions in law are extremely dangerous. Agistment is not the tithe of herbage, strictly; but grass fed by the mouths of barren cattle. In many parts the grass, though cut, is not made into hay. But suppose it meant more; why do we not see some proof that *Sandys* got any thing more than hay? he should have proved that. Men had no idea of the tithe of agistment in the North, in those times; and the 6s. 8d. rent is expressed in the Ministers Accounts, to be for the tithe of hay. Then we come to *Crowe's* family; what evidence is there that they had all the lands in *Ellerton*? Nothing is done to prove the claim extends to agistment; nor is there any evidence of their having ever claimed it: and no minister of the Crown ever thought of such a right, or acted as if he had. On these grounds, I think no title is shown in the defendant, to take it out of the vicar. Then I find, in the ancient causes, no resistance to the vicar's general right; and he has, in every township, taken the only tithe that looks like it, and which he could only receive, *de jure*, as agistment, that is the tithe for lambs and sheep; no resistance being made on the ground that it was not a wool-tithe. I therefore think that no title, or shadow of title, is shown by those who resist this claim under an impropriation. The Begare tithes, alluded to in the inquisition, meant great tithes, or nothing. The vicar, therefore, was entitled to all tithes not enjoyed by the rector; and, *inter alia*, to agistment.

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v.
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&c.

THOMSON, *Chief Baron*. The opinion that has fallen from one of the Court, respecting the manner in which the vicar's claim is laid, I do not consider consonant with the general rules or practice of a Court of Equity. I do not apprehend that such a rule ever existed, as that a plaintiff who claims too largely, fails altogether. A vicar who claims tithes throughout a parish, may establish his case by proving his right in part; though, in matters of prescription at common law, the rule is very different. In bills, whether by rector or vicar, the plaintiff's failing as to part, does not invalidate the rest of his case, as is proved by every day's practice. The only effect of such a laxity of pleading is, the punishing him with costs, and that only where it is clear that the vicar is not entitled. But I do not think that he has laid his claim too largely, or failed, in the present instance. We are agreed, as to an issue on the modus for *Killerby*; and on the exemption set up in *Byam v. Fawcett*, for *Greenbury Grange*: but it by no means follows that he has failed on those points, or that the Court thinks so. There are difficulties on both sides; and therefore the questions are fit for the interposition of a Jury. The witnesses, and the depositions in the suit given in evidence, do not greatly advance the truth of the case. The exact question is not well known: a payment of 4*l.* seems to have been insisted on, but whether the suit was instituted to establish it, or for what other purpose the bill was filed, is not quite clear. A great deal of evidence has been given to support the modus; though one person stated his recollection of the commencement of it as a composition; but he was very young then.

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As to the *Greenbury Grange*, there is evidence of a confirmation to the Abbey of *Fountains* of what they had in *Greenbury*; but what they had is a question: therefore, whether they had these lands, and of what extent they were, must be the subject of an issue.

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Then arises the general question of agistment, between *Byam* and *Lawson, Crowe, and Wood*; and it is confined to that. It is admitted that the plaintiff is entitled to all the tithes, except corn, hay, and agistment. In all the causes, an attempt is made to establish a title in the defendants to agistment. It is visible, however, that they have difficulty in stating how they became entitled. In support of the answer, there is not a tittle of evidence of a title derived from the Crown, except as to the great tithes, for which originally a rent of 10*l.* *per annum* was paid; but that rent was paid expressly for the great tithes, and the great tithes only. The grantee purchased that 10*l.* afterwards, of the Crown. Some of the defendants joining *Sir John Lawson*, are the tenants of other persons, who say their landlords are entitled; but there is no proof of that, or of any title in the Duke of *Leeds*. One defendant there is, however, (*Dodd*) whose defence is material. He says, one *Robert Bower* is entitled to the great tithes and agistment in *Tunstall*; but there is no evidence of any payment to Mr. *Bower*. The answer in *Byam v. Crowe* is material, the defence being apparently strengthened by the word *herbagium* having been introduced in the grant to *Crowe's* predecessors. There is no conveyance.

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conveyance of agistment proved, however, unless it passed by the grant of *James I.* of hay and herbage to *Sandys*, on what I call a speculation. What possession *Sandys* ever had of agistment, does not appear. There was afterwards a grant to *Phillips* and *Moore*, by the same description. Let us suppose, therefore, that the true construction of *herbagium* was agistment; what possession has there been here? None at all is shown. That *herbagium* means agistment, in many cases, there can be no doubt; but the term, however, is not fully settled by the glossaries: yet, it by no means follows, that here it necessarily imported agistment. In the Ministers Accounts, in 31st *Hen. VIII.* as to *Ellerton*, nothing is accounted for but 43*l.*; and it appears what that was for;—“*Richard Whalley*, farmer of the tithe of corn of “*Ellerton*.” Hay, therefore, was not given; and that might be the object of Mr. *Sandys*’s purchase. There are many cases among the records where *herbagium* can only mean grass, as contradistinguished from agistment, or grass eaten by the mouths of cattle.—(*His Lordship here took notice of the various senses in which the word appeared to be used in the several documents before the Court.*)—Such uses of the term in the documents produced are decisive of its meaning grass, till made, and then it is called hay: There are also many instances in the books of strong contrast between *herbagium* and *agistamentum*. It does not, therefore, follow, that *herbagium* was meant to convey, or did convey, more than *fenum*, although it might. I think *herbagii* meant no more than *feni*. The question, therefore, is, what title

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title the plaintiff has made out to it, for none of the defendants have; and *Crowe's*, if he had, would only extend to *Ellerton*: and I think the vicar has made out that title which is usually expected, where no endowment is produced. He shows the rector only had what is called great tithes. Pope *Nicholas's* Taxation, the Ministers Accounts, and Ecclesiastical Survey, show the vicar possessed of the small tithes and privy tithes; and that title is not lessened, I think, by mentioning what are in the *Easter Book*, which generally are very small; for that has not confined the tithes to those there mentioned. But it is admitted in all the causes, that the vicar is entitled to and has received all small tithes, except agistment, and no other person has been shown to have received that. Now it is a common rule, that if you show that the vicar has received all that has been paid, he must be taken to be entitled, not only to those, but all others of new introduction, although never before paid. The vicar, therefore, having made out his title, and no sufficient defence being set up; there must be a decree for the plaintiff, for all tithes in each case, except *Killerby* and *Greenbury Grange*, which will be the subject of issues.

Costs reserved, till the issues tried.

1816.

Monday,
29th April.

PREVOST v. BENETT and others.

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A modus of 3d. a year for every cow, and 6d. for every calf, in lieu of the tithes of cows, calves, and milk, is good.

A modus of 1d. a year, in lieu of the tithe of gardens, is good, and may be so pleaded, without stating that it is payable for ancient gardens.

As to the fact of the modus being payable for gardens generally, or ancient gardens, the jury will be directed to take that into their consideration, and the Judge to endorse the *postea* according to their verdict.

Where there are several issues directed, and some are

found for the plaintiff and others for the defendant, the parties will be allowed costs on the issues found in favour of each, and must pay them where the issues are found against him.

THE plaintiff, as vicar of *Tisbury*, (*Wilts*) claimed, by his bill, the great and small tithes of the parish, in kind, due from the defendants, occupiers of land therein.

The answer admitted the plaintiff's title to tithes generally; but insisted on the following payments, as moduses 'in lieu of the tithes of cows, calves, milk, heifers, gardens, eggs, and poultry respectively; that is to say, the sum of 3d. a year for every cow, and 6d. for every calf, in lieu of the tithes of cows, calves, and milk;—the sum of 1½d. a year for every heifer,—the sum of 1d. a year in lieu of the tithes of gardens,—and the sum of 1d. a year for eggs, in lieu of the tithes of eggs and poultry.'

As to the garden modus, the plaintiff, by amendment, charged, that the defendant *Benett* had recently converted about two acres of pasture land into a garden, and that the modus pleaded, if it had ever existed, could only apply to ancient gardens; which he admitted, stating that he did, at the same time, convert an old garden, consisting of three acres and upwards, into meadow or pasture, from whence the plaintiff had taken tithe of hay in kind.

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The depositions for the plaintiff went to prove, that the payments had been broken in upon, and varied; and that larger sums had been paid at different times, for the tithes alleged to be covered by the moduses, such as 3s. for tithe of cow and calf, and 1s. for gardens.

Wetherell, and *Spence*, for the plaintiff, contended, that the modus of 9d. for cow and calf was rank. They objected also to the laying the modus of a penny for gardens generally.

Dawncey, and *Daniell*, for the defendants.

THOMSON, *Chief Baron*. The bill claims all the great and small tithes arising from the different hamlets within the parish of *Tisbury*. It is not quite clear, whether all the tithes of corn and grain were received by the plaintiff; but, according to my recollection, a balance was admitted, by the defendant, to be due on an account current; and if so, the plaintiff will be entitled to have an account of all such tithes as are not covered by the moduses which have been set up.—(*His Lordship then stated the moduses from the answer*).—The 3d. for every cow, and 6d. for every calf, payable in lieu of tithes of cows, calves, and milk, make one entire modus in respect of those different articles. The penny for gardening is laid generally, without taking any distinction of the garden being ancient or modern. The evidence on these moduses, though not very distinctly read, seems, as the Court understood it, to be sufficient to induce us to grant issues,

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issues, if we should be of opinion that they are well laid.

We are then to consider what objections there are, in point of law, to the moduses, to oblige the Court to over-rule them.

It was contended, that the entire modus of 3*d.* for a cow, and 6*d.* for a calf, (laid as one entire modus,) was rank, and that the Court were bound to take notice of that rankness, without resorting to an issue; and the case in *Bunbury*, of *Frankland v. The Master and Brethren of St. Cross (a)*, was cited. But there the sums were payable as distinct moduses. The first was 12*d.* for a milch cow; the second, 6*d.* for every calf killed and sold: both of which are said to have been held rank. But in a note to the same case, it is said, that a modus of 6*d.* for a calf had been subsequently held to be good; and the case referred to there, is that of *Reynall v. Wills*, and is to be found in 2*d Wood*, 144; and there it appears, that on a cross-bill being filed by one of the defendants, the owner of an estate in the parish, the Court established a modus of 8*d.* for a calf. That was a case subsequent to that of *Frankland v. St. Cross*; and there the impropiator waved all his demands which the moduses were said to cover, thereby admitting himself to be unable to dispute the validity of them on the ground of rankness.

There is also another case, of *Roe v. The Bishop*

(a) Bunb. 78.

of

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of *Exeter* (b), which is very strong. There a modus of 1s. 5d. for every cow having a calf, for the tithe of the milk and the calf, was insisted on and allowed: That case is also reported in 2d *Wood*, p. 137, where it appears, that *The Bishop* submitted to the opinion of the Court, declining a trial at law, after an offer made him by the Court; showing that there was no validity in the objections made to it. There is also the case of *Phillips v. Symes* (c), which is likewise subsequent to that of *Frankland v. St. Cross*, where a modus of 8d. for a cow, and 4d. for a heifer, were established in lieu of the tithes of milk and calves for such cow and heifer, without an issue being granted. On these authorities, therefore, we are of opinion, that there is not such evidence of rankness in this case as would authorize the Court to say that there shall be no inquiry. It must therefore go to a Jury. It is observable, that notwithstanding there are two sums, they are put together as one modus, and amount, so considered, to 9d. for milk, cows, and calves.

There is another modus objected to, of 1d. for every garden, which is certainly laid generally, and not confined to ancient gardens; and there are many cases wherein it has been laid both ways, as for gardens generally, and for ancient gardens. There are many instances of both, in cases of prohibition; and there may be such a modus, applying differently

(b) Bunb. 57. 2 Wood, 136.

(c) Bunb. 171. 2 Gw. 654. 2 Wood, 228.

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in different parishes. The true meaning of a garden is, the ground furnishing fruit and vegetables for the house to which it is attached. In the cases which have been already alluded to, of *Reynall v. Wills*, and *Roe v. The Bishop of Exeter*, 1 d. is laid as payable for gardens generally, not confining it to ancient gardens. On that point, too, there is a modern case, of *Blackburn v. Jepson* (d), where the Master of the Rolls held, that it was not necessary, in laying a modus for orchards and gardens, to state that they were ancient. As to the objection of this being a modern garden, that is supported only by *Benett's* saying that he had made a new garden; and that there was any fraud is not even pretended, nor that the new garden was not intended for vegetables for the consumption of his household. And thus explained, we think that on this evidence also, there should be an issue directed, and that it should be on the question of the modus being payable for gardens generally; and that the Jury should be directed to say whether they find the modus to be payable for gardens generally, or only for ancient gardens.

There is a *dictum* to be found in *Hetley* on this point, which should be attended to. It is in *Woolmerston's* case (e), which was a libel for the herbage of young cattle. It was put, that a parson might libel for tithes of an orchard, for that it was a young orchard, there being a custom to pay 4d. for an orchard; when *Hitcham* said, 'that there

(d) 17 Ves. 476.

(e) Page 85.

' was

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' was no such difference between old and new orchards ; for if the custom be, that he shall pay 4d. for every orchard, it will reach the new orchard.' That *dictum* does not amount to an authority, but it is, at least, the opinion of a learned man, at that time a Serjeant, and may be used by way of illustration. In the same way we may refer to *Watson's Clergyman's Law* (f). The author, commenting on the opinion given in *Thornhill's case* (g), that tithe ought to be paid in specie for an enlargement of an ancient garden, for which a penny had been accustomed to be paid, says, (having the other case in *Hetley* also before him,) the reason is, because the prescription was particular for that garden only ; but if the custom of the parish had been to have paid yearly a penny for each garden in the parish, the addition or enlargement of a garden would not make any tithes due in specie.

Taking the whole into consideration, we are of opinion that there should be an issue generally, as to the modus of a penny for gardens ; and the Jury may be directed to distinguish and endorse, whether the modus found applies to one or the other species of garden ; and the Court will finally dispose of the cause on the return of the *postea*. No objection was made to the other moduses, in point of law.

An account was decreed for all tithes not covered by the moduses ; and the question of costs was reserved for the discretion of the Court.

(f) Page 447.

(g) *Hetley*, 94.

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v.

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The issues granted on each of the moduses pleaded, having been tried, the Jury found a verdict in favour of the plaintiffs at Law, on all except the second issue, ($1\frac{1}{2}d.$ for every heifer): and the Court apportioned the costs according to the result of the trial of the different issues; each party receiving costs of the issues found for him; and paying them on those found against him.

END OF SITTINGS AFTER HILARY TERM.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER.

EASTER TERM,—56 GEO. III.

1816.

Friday,
3d May.

RAINE v. HODGSON.

A RULE had been obtained last *Hilary* Term for setting aside the verdict which had been obtained in this cause at the sittings in that term, for want of due notice of trial being given to the defendant, under the 14 *Geo. II.* ch. 17, sec. 4, which requires ten days notice at least to be given, where the defendant resides above forty miles from the cities of *London* or *Westminster*; in construing which statute (it was said) the Courts have uniformly held, that in all such cases there must, by the course of practice, be fourteen days notice given (*a*). The defendant's affidavit stated, that he resided at

The clause in the 14 *Geo. II.* requiring ten days notice of trial for the sittings in *London* or *Westminster* to be given to a defendant, *where he resides above 40 miles from the said cities*, held to apply to his permanent, not temporary residence.

(*a*). *Brind v. Torris*, 2 Bl. Rep. 1205.—*Spencer v. Hall*, 1 East Rep. 688.

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Brighton at the time when he should have received notice of trial in the regular course.

Campbell, opposing the rule, put in an affidavit of the plaintiffs solicitor, stating, that process was issued in *Michaelmas* Term, and served the 13th *November* at the residence of the defendant in *Portman-square*, where he then resided; that on the 16th *January* last, notice of declaration being filed was left there also, with the defendant's housekeeper; that on the 1st *February* defendant pleaded, and, on the same day, issue was delivered, with notice of trial for the following sittings, which were held on the 10th *February*, when he received a note from defendant's clerk in Court refusing to accept the notice of trial, as the defendant then and at the commencement of the action resided at *Brighton*. The affidavit also stated deponent's belief, that the defendant had continued to reside in *Portman-square* till the 1st of *February*, on which day he let his house there for a short time, furnished.

It was contended, that the defendant had neither so abandoned his dwelling-house in *Portman-square*, or so completely taken up his residence at *Brighton*, even if it were true that he was there at the commencement of this suit, as to entitle him to set aside the judgment for want of sufficient notice.

The cases cited all refer to a *bond fide* leaving the town residence by the defendant, and his permanently residing beyond the distance of forty miles from *London*. In *Brind v. Torris*, it is distinctly stated,

stated, that the defendant left *London* on the 16th *April*, which was two days before the declaration was delivered, and had gone to *Dublin*. So in *Spencer v. Hall*, the defendant had quitted his residence in *Middlesex*, and gone to reside permanently in *Worcester*; and notice of that was given to the plaintiff before the delivery of the declaration.

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Per Curiam.—The words of the statute, “where the defendant shall reside,” must be taken to mean his permanent residence. It is not to be supposed that a plaintiff is to follow a defendant during his temporary residence at a watering place. It appears by the affidavit read on the part of the plaintiff, that the defendant had a substantial place of residence in *Portman-square* up to the very day of the service of notice of trial.

Rule discharged.

1816.

Saturday,
4th May.

WILSON v. STEPHENSON.

If the Jury find that words directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict be recorded for the defendant, the Court will not grant a new trial on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had had the misfortune to have been the occasion of his brother's death by an unlucky accident.

A Verdict had been found for the defendant at the Spring Assizes for *Stafford*, in this action, which had been brought for words spoken by the defendant, imputing to the plaintiff the crime of murder. It was proved that the plaintiff had called the defendant a murderer, and said that he was guilty of the murder of his brother, accompanied with other language of reprobation. It appeared, that on some occasion of public rejoicing at the place where the parties lived, the defendant had had the misfortune to be the innocent occasion of the death of his brother, by discharging a small cannon, the wadding from which struck and killed him as he was imprudently crossing before it at the instant of explosion.

The defence was, that the words, whatever they were, had been spoken in the way of admonition to the plaintiff, on the general tenor of his conduct.

The Jury found, that the words were spoken, but not maliciously; which was recorded as a verdict for the defendant.

Dauncey now moved for a new trial, on the ground, that if words charging a plaintiff with being a murderer, and that he had murdered his brother, founded on the melancholy fact of his having been
 actually

actually the cause of his death, by means of such an accident as had occasioned it, had been found to have been uttered at all, (and particularly when expressed in anger, and with warmth, and accompanied by other charges of a criminatory tendency, as had been the case in the present instance,) it was not within the province of a Jury to qualify accusations of so highly serious a nature, by stripping them of the motive, which the law will imply to be necessarily inferrible, from the fact of their having been made. The words having been used to the plaintiff, under the peculiar circumstances of his situation from the accident alluded to, could not have been used otherwise than in malice; and therefore, if the special finding of the Jury were to be taken as a verdict for the defendant, it would be a verdict against evidence; and on that account there ought to be a new trial: but

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WILSON
v.
STEPHEN-
SON.

The Court were unanimously of opinion that it was entirely a question for the Jury, and that notwithstanding any particular circumstances attending the case, they were concluded by the verdict, and would not therefore disturb it.

Rule refused.

1816.

Monday,
6th May.

MANBY, Clerk, v. CURTIS and others.

Endowment produced, showing the vicarage *expressly endow-
ed of hay*, not sufficient to support a bill for that tithe, without usage, against evidence of a money payment to the rector in lieu of corn and hay.

Grant from the Crown (subsequent to endowment) of lands, including in the general words all the tithes, &c., not sufficient to overturn the vicar's right, without proof of perception.

A particular and minute enumeration of the several articles of endowment in the instrument, does not preclude the vicar's right to other small tithes, not mentioned therein.

THE plaintiff, vicar of the parish church of *Lancaster*, claimed by his bill against the defendants, occupiers of lands in the township of *Bleasdale*, the tithe of hay, and all small tithes arising therein; and, amongst other things, the bill alleged, that several offerings, oblations, emoluments, and other dues and duties, and several *mortuaries*, had become due to the plaintiff.

The answer denied the plaintiff's title to any tithe except lamb and wool, for which it stated the defendants had been accustomed to make an annual payment; and alleged, that the tithe of hay was covered by a modus of 5s. 7d., payable to the impropriate rector in lieu of corn and hay.

On the part of the plaintiff was produced an endowment by the archdeacon of *Richmond* (dated 14th March 1430,) of the perpetual vicarage of the church of *Lancaster cum Pulton*, belonging to the monastery of *Sion*. That endowment was particularly and minutely worded. Its contents are given almost in detail in the commencement of the judgment.

The defendants, on the other hand, put in a grant of 20th Jac. I. to *Edward Badby* and *William Wellden*, of (*inter alia*) crown lands in *Bleasdale*, within

within the forest of *Amounderness*, in the county of *Lancaster*; and also, (amongst the general words,) "all tithes of sheaves, corn and grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatsoever, as well great as small, and all oblations, obventions, fruits and profits, waters," &c. &c. thereto belonging.

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Dauncey, Martin, and Heys, for the plaintiff, relied on the endowment; which, they contended, placed the vicar in *loco rectoris*, and that it was not impugned by the vicar's not having enjoyed perception under it to its full extent, unless total non-perception were shown, or adverse enjoyment, from which, they submitted, the case was relieved by the defendants admission of the tithe of wool and lamb being due to the vicar.

Fonblanque, and Whetherell, on the other side, insisted, that an endowment *per se*, and without evidence of perception, was not such proof of title as would support a vicar's claim (*a*); that the *modus* was an answer to the claim of hay; and that the grant of *James I.*, coupled with non-payment of the tithes, was destructive of the endowment, so far as it was not supported by the usage; that the endowment mentioning hay must have been a mistake, or it must be applicable to the money-payment in lieu of that tithe.

In reply, it was said that the Crown could only have become entitled to what remained in the

(a) *Carr v. Heaton*, 3 Gw. 1258.

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monastery at the dissolution, and that the grant must be so construed; if so, it was clear, that the vicarage was endowed expressly of hay, and therefore, it could not have belonged to the abbey.

THOMSON, *Chief Baron*. This is a bill brought by the plaintiff, as vicar of the parish of *Lancaster*, and what he prays is confined to his claim upon the township of *Bleasdale*, part of that parish; and he demands in that parish, particularly, tithe of hay, flax, hemp, potatoes, turnips, carrots, and the produce of various other seeds and roots; and he states, that the defendants got and made from milch cows, large quantities of milk, butter, and cheese, and other small tithes; in short, there is a general enumeration of small tithes, so that it is stated, that his title comprises hay and all small tithes within the township. His claim is under an existing endowment, made within the time of legal memory. That endowment bears date in the year 1430, and is made by the archdeacon of *Richmond*, who was the ordinary of this place; and it appears to have been made with the assent of the bishop of *London*, who was the ordinary within whose jurisdiction the monastery of *Sion* was situated; the abbess and monastery of *Sion* being the impropiators of this living of *Lancaster*, or rather, the priory who had the living.

Now it is necessary to see what is the effect of that endowment. It states, that the ordinary had urged the creation of a vicar in this church of *Lancaster*; in consequence of which, the archdeacon states, he caused an inquisition to be made respecting the mat-
ters

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ters with which he was to be endowed. It then proceeds with stating the creation of one perpetual vicar, in the church of *Lancaster* to officiate, and not in other parts; and it was decreed, that the portion of the vicar for the time being should be in oblations and tithes, and other profits and emoluments arising from the places, things, and goods within described only, and not to exist, or be in other things, in all further times *; and they decree, limit, and assign, that the perpetual vicar shall for his sustentation, and in support of the charges on him as vicar, receive the same freely, peaceably, and quietly. It then states, that the vicar shall repair and maintain the mansion formerly called the *Priory*, with all its houses, chambers, dovecotes, and stables. It then proceeds particularly to the articles with which he is to be endowed, and adds, that he is to have the tithes of all sheaves in and of the fields of the vill of *Lancaster*, and the tithes of all sheaves of *Thornerne* and *Glassane*, within the parish of the church of *Lancaster*, in what manner soever arising; and also the tithes of sheaves of *Rygley*, *Wra*, and *Bagerburgh*, within the parish, and the oblations whatsoever in the three principal feasts of the Nativity of our Lord, Easter, and the assumption of the Virgin Mary; and all churchings in churches and chapels, and marriages in churches and chapels; wax lights at the time of burials, and also all mortuaries whatsoever in the parish church, with its members, howsoever arising; and that the vicar shall receive and have in the right and name of his portion for ever,

* His Lordship, reciting the endowment, took it from the instrument, as far as was thought necessary, *verbatim*, and it appears to be literally translated.

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tithes whatsoever of lambs, wool, calves, butter, milk, and cheese whatsoever, of those inhabiting the places called *Wyresdale* and *Bleasdale*; and the entire tithes of pigs, ducks, salmon, eggs, garlick, onions, and leeks, and of flax and hemp, dovecotes, apples, *hay*, and milk, of the whole parish. It proceeds then to bestow upon him other offerings of the church; and it states, that the estates with which he is endowed are worth nearly 76*l.* 19*s.* 7½*d.* as it was found by the inquisition, (which was a very large sum in those days.) And then it charges him with several considerable burdens, which the abbess and convent would be liable to; and ordains, that the abbess and convent of the monastery of *Sion*, to the said church of *Lancaster*, with the church of *Pulton* as aforesaid, appropriated, and the same as aforesaid obtaining in the right and name of the church of *Lancaster*, with the said church of *Pulton*, given and granted in all future times, shall perpetually have and receive in all future times, all and all manner the great tithes, of whatsoever kind of blade, of hay, and other rights and emoluments whatsoever, to the same church of *Lancaster* in anywise appertaining and belonging, except the portions and parcels above specified, to and for the portion of the said vicar and his aforesaid vicarage limited and assigned. This received a confirmation from the bishop of *London*; and in 1461, thirty years afterwards, there was a confirmation again by the archdeacon, together with some addition to the endowment, that the perpetual vicar should find bread and wine for the communion. This is the endowment under which the vicar's claim was founded; he has not the benefit of showing any
actual

actual receipt of tithes in kind by his predecessors, as far as it can be traced, except in the book of an old rector, which was in 1691. It appears that these tithes were let out by the vicar, from time to time, and of late they have been so let to occupiers of land in *Bleasdale*.

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The defendants, by their answer, admit the plaintiff to be vicar, but they deny that he is entitled to any tithes whatever, except the tithe of lamb and wool, notwithstanding the ample endowment of other tithes contained in that instrument; and then they insist that his endowment does not extend to the tithe of hay; and the reason they give why it does not extend to the tithe of hay in *Bleasdale* is, that there has been immemorially paid to the rectors of this church of *Bleasdale* a sum of 5s. 7d. in lieu of the tithe of corn and hay, arising, growing, renewing, or increasing within the township of *Bleasdale*; and that no tithe, or payment in lieu of the tithe of hay, has ever been rendered or paid to the vicars of the parish church of *Lancaster*, by the occupiers of lands in *Bleasdale*, but only to the improper rectors; and therefore they contend, that though the endowment has mentioned the tithe of hay, it is erroneous in that respect, and that no such claim was ever set up. Then they attempt to make another defence with respect to all the other tithes, of this sort. They state that the whole of the township of *Bleasdale* was formerly part of the demesne or forest lands of the Crown of *England*, and that by a grant under the great seal of *England*, and seals of the duchy of *Lancaster*, bearing date the

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the 21st *March*, 20 *James* I, the King, for the considerations therein mentioned, had given for himself, his heirs and successors, to *Edward Bradby*, and *William Weltden*, in fee for ever, amongst other hereditaments, the said township or hamlet of *Bleasdale*, then consisting of several corn pastures, called by the several names specified in the answer; and all and singular tithes of sheaves of corn and grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatever, as well great as small; and also all oblations, and so on, situate, lying and being, arising, growing or renewing, within towns, fields, parishes or hamlets, thereinbefore mentioned; and the grantees were thereafter to hold and enjoy the several liberties and privileges therein mentioned, as fully, freely, and entirely, and in as ample manner and form, as his Majesty or any of his progenitors or ancestors, or any earl or duke of *Lancaster*, or any abbot or abbess, prior or prioress, or any or either of the then late monasteries, or any chaplain, had enjoyed the same. And they state, that this rectory of the church of *Lancaster*, which extended to and included the township of *Bleasdale*, formed a part of the possession of the monastery or convent of *Sion*, and that, upon the dissolution of that monastery in the reign of *Henry* VIII, the rectory became transferred to, and was at the time of the grant, vested in the Crown; and therefore, they submit, it is to be inferred that the tithes of the lands within the township of *Bleasdale* passed by the grants from King *James* I, to *Edward Bradby* and *William Weltden*, and that the defendants, as the occupiers of the lands and premises comprised

comprised in the grant, and as deriving their title thereto from *Badby* and *Wellden*, are exempted, by means of this grant, from all the tithes which are demanded. This is the nature of the defence ; and, in consequence of this defence, the vicar thought proper to amend his bill, and to make land owners parties, who are the landlords of some of these defendants ; and the landlords put in an answer, in which they maintain their tenants right to the tithes, and the modus, which they allege to be payable to the impropriate rector. It appears that the former vicar's name was *White*, who was a prisoner in *France*, and died there ; but I believe he died before he was instituted. There was found among the papers of *Oliver Martin*, a former vicar of this parish, a vicar's book in 1690, and which appears to contain several articles of tithable matters, wool and lamb, the tithes to which the defendants would by their answers confine the vicar. Other certificates are produced, of tythes called quakers' tithes, and, in one instance, amounting in the whole to 1*l.* 3*s.* from one quaker ; all these are in *Wyresdale*, and not in *Bleasdale* ; but it is to be observed, the tithes are granted in *Wyresdale* and *Bleasdale* jointly : and therefore, what the vicar is entitled to in the one, he is intitled to in the other. Then it lies on them to show what tithes had been paid ; and they produce evidence to show what tithes the lessees took under their leases, all of which were paid by way of composition ; and the witnesses say generally, that that composition was paid for lamb and wool, but there are others who speak as to their paying, not only lamb and wool, but geese and pigs, and

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and an annual sum for a sow. This is the nature of the evidence they give as to the perception of tithes, if it can be called perception; and there is certainly evidence of composition for other small tithes than wool and lamb having been paid to the vicar.

This was the nature of the case that was laid before the Court on the part of the plaintiff, resting upon the words of the endowment, and on his lessees (though *bond fide* occupiers of the land,) having received composition for various articles besides wool and lamb. The defendants insist, in their defence, upon the modus they had set up as payable to Mr. *Standish*, the improper rector. It is observable, it was one single modus of 5*s.* 7*d.* for both corn and hay, and not one payment for corn and one for hay. Now they enter into no sort of proof on the part of the defendants, with regard to the title of the rector to any tithe whatever, otherwise than that which arises from the fact which is proved, that, for a series of years, commencing in 1788, the impropriator has received a payment of 5*s.* 7*d.* which was understood to be for the tithe of corn and hay also; and there is no evidence on the part of the vicar, to show that his lessee, or the vicar himself, did receive in *Bleasdale* the tithe of hay. It is contended, therefore, that the tithe of hay is not included in the endowment; and that, if it passed any thing under the denomination of hay, it could pass only the modus that it claimed in lieu of that tithe. Now it is difficult to support that latter suggestion, for it does not appear what was the

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the amount of the tithe of hay, as distinct from the tithe of corn, or how the 5s. 7d. was to be apportioned. If, however, the fact is, that from time immemorial it has been a payment for both, it is difficult to say how the vicar's claim to tithe of hay can be made out. The tithe of corn is always reserved to the monastery, where it is not otherwise expressly granted; and it is granted no where, that I see, within the parish, which it is said comprehends *Bleasdale*: and there may be some difficulty in the construction of the grant with regard to that exception. It is stated, in point of fact, that hay has been received by the vicar in other parts of the parish, as it appears by entries in the books of the parish, that the tithes of hay was received; but there are none applicable to *Bleasdale*. Now this has been proved to be the usage for a great length of time. The evidence on the part of the defendants has proved, that with respect to hay, from 1788 the understanding in the parish was, that 5s. 7d. was paid in lieu of the tithes of hay in *Bleasdale*, as well as of corn; it is therefore difficult to say we can at present, in the face of that evidence, decree the vicar the tithe of hay in *Bleasdale*; therefore there must be, as it appears to us, an issue, directed in the words of the answer, whether, from time immemorial, there has been this payment of 5s. 7d. made to the rector in lieu of the tithe both of corn and hay. With respect to the other small tithes demanded, there is no evidence whatever of any person having received them other than the vicar. As to the ground of defence under this grant of *James I.*, if that

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that means any thing, it would carry all tithes of every kind to those grantees; and it is to be observed, that it is not confined to the lands out of which these tithes are received, or the lands in the parish of *Lancaster*, but it comprises a great quantity of lands in the county of *Lancaster*, and lands belonging to the duchy of *Lancaster*, in the county of *Leicester* also; and then, at the conclusion, are the general words passing these tithes, to the extent I have mentioned, that is, all and every the great and small tithes in the lands so granted; words certainly large enough to comprehend all that is contended for, if there had been any enjoyment under it to give it effect. (*Reads the words.*) Now there seems ground to contend, that these words would not pass that which the vicar was not endowed of at the time of the grant. It is extraordinary, that there has not been on the part of these defendants, any desire to show us what it was that the monastery of *Sion* was in possession of at the time of the dissolution. There were no ministers accounts produced to show what tythes were at that time in the possession of the monastery; and the observation is applicable to this, that it does not appear that at the dissolution of the monastery the rector had the tithe of hay.

Then the question is, what is to be the consequence of the opinion we entertain; there being no usage proved to take from the vicar any other tithe than that of hay, he must be decreed to be entitled to an account of all else that he has demanded; and though the words of the endowment
only

only contain particular articles of small tithes, yet that will not deprive him of other small tithes, for the true construction of that enumeration is, that the articles named are only put to instance what was payable at that time ; but they will clearly carry all vicarial tithes, although not expressly mentioned in that instrument. There is a tithe demanded, of which the vicar was expressly endowed, that is the tithe of mills ; it is admitted, by the defendants, that some of them (it does not appear which, but that must be inquired into,) have enjoyed and worked corn mills on the lands ; and therefore we must decree the profits of those mills : but nothing more than the clear profit, *ultra* all expenses of rent, and carrying on trade ; that was so settled in *Chamberlain v. Newte (a)*. There is one other article demanded, which I do not remember ever to have seen in a bill before. It is, the tithe of mortuaries, but it is not stated at what persons' death they became due, or how it is that these defendants are liable. It is a moot question, whether mortuaries may be sued for, even at Law, and whether they must not be proceeded for in the Spiritual Court, under the Act of 21st of *Henry VIII.* chap. 6. It is not necessary, however, to enter into a minute inquiry upon that subject, because they have given no evidence with respect to these defendants being liable to mortuaries, and therefore that, at present, is not material ; otherwise it would be difficult to say that they would be recoverable in a Court of Equity.

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(a) 2 Gw. 596.

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There must be an issue as to the general modus, and whether it be payable as well for the tithe of hay as of corn; the defendants to be plaintiffs, being bound to sustain the rector's right. The question of costs must be reserved for further directions.

With respect to mortuaries, the bill must be dismissed, but it is not worth while to give any directions respecting costs upon that subject.

As to the rest of the bill, there must be a decree for all the other tithes demanded.

1816.

Wednesday.
8th May.

BENNETT v. FORESTER.

If, pending proceedings against bail, a writ of error be allowed, the bail, on application to the Court, will be given the same time to surrender the principal, after judgment affirmed or writ of error non-prossed, as they would have had at the time the writ of error was allowed; and in the mean time the proceedings against the bail will be stayed.

IN the course of the last term, *Owen, W.* had obtained a rule, by which the plaintiff in this case was called on to show cause, why the proceedings against the defendant's bail should not be stayed, pending the writ of error allowed in this action, and why the bail should not have the same time to render the defendant, after judgment affirmed, or writ of error non-prossed, as they would have had at the time of the allowance of the writ of error.

Proceedings on their recognizance had been commenced on the 5th February against the defendant's

And that application will be granted, where the writ of error was allowed two days after the return of the *subp. ad. resp.* against the bail, and the motion not made till five days after (the fourth day being Sunday.)

bail,

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bail, by service of a writ of *subpoena ad respondendum*, which was returnable on the 7th. The defendant then sued out a writ of error, which was allowed on the 9th, and notice of the present motion, to stay the proceedings pending the writ of error, was served on plaintiff's clerk in Court on the same day.

This rule had been applied for on Monday the 12th, and was granted, on the ground that a writ of error being a *supersedeas* of all proceedings, *pendente errore*, the bail (consistently with the practice in the other Courts,) ought to be allowed as much time after the errors should be disposed of, to render their principal, as they would have had (exclusive of what had already elapsed after the return of the process sued out against them,) in case the writ of error had not been allowed; and cases were cited, to show that that was the practice of the other Courts (*q*).

Oldhall showed cause, furnished with an affidavit made by the plaintiff's clerk in Court, stating a detail of the proceedings in the action against the principal; and that, according to the practice of this Court, the defendant's bail would have become fixed, unless they had surrendered the defendant within four days after the return of the process against them; and that the deponent had not been served with notice of render. The plaintiff's solicitor

* Vide *Tidd's Practice*, p. 269, 525, 526. (5th edit.)

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also deposed, that he believed the writ of error had not been sued out for any real error, but merely for the purpose of delay.

It was submitted, that the rule now opposed had not been obtained in time, the bail having only four days to render the principal, after return of process, and the application, in the present instance, had not been made till the 12th *, although the writ was returnable on the 7th; that the allowance of the writ of error on the 9th, did not operate as a *supersedeas* of the proceedings against the bail; and that, under the imputation of a merely dilatory purpose in suing out the writ, (the affidavit made on the defendant's part containing no suggestion of actual error existing,) it should therefore be discharged. A case of *Whitfield v. Bird*, in this Court, T. 37th G. III. was cited, where a rule *nisi* of 23d of *June*, to stay proceedings against the bail, who had been served with process on the 17th *June*, returnable on the 19th, and had obtained a writ of error, which was allowed on the 23d, was discharged with costs. *Copous v. Blyton* and another (*c*) was also mentioned, a case wherein the Court of Common Pleas held the bail fixed, and would not consent even to stay proceedings, but on terms of undertaking to pay the condemnation money, the costs of the action against themselves of the proceedings in error, and of the application (*b*).

* The Master reported, that in calculating the four days, one was inclusive, and the other exclusive.

(a) 1 N. R. 67.

(b) *Tidd's Pr.* p. 529. (5th edit.)

Owen,

Owen, in support of the rule.—It is quite clear, that the attorney's belief, that the writ of error is brought for delay, is wholly nugatory.—(*The Court assented to that proposition.*)

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Then the only question is, whether we were in time. The bail were served with process on the 7th; on the 11th we were entitled to surrender the principal at any time before the rising of the Court, but that day being *Sunday*, we had till the 12th; the writ of error was allowed on the 9th, and that is the day to which the Court are to look on the question of the application being made in time, and not when the indulgence was applied for. It was so held in the case of *Sprang v. Monprivatt (c)*.

The COURT made the

Rule absolute.

(c) 11 East. 319.

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BOURKE, Clerk, v. ISAAC and others.

1816.

Thursday,
9th May.

THE defendants, in their answer to this bill for tithes, set up a defence of *modus* in these words; "There is now, and has been for time immemorial, a *modus*, in respect of what titheable article the *modus* is laid, it is bad for uncertainty: and the omission is a substantial defect which no evidence can supply.

But if it can be collected from the whole answer, to what article it refers, it will be sufficient.

Y 3

"a custom

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“ a custom of tithing within the said parish, under
 “ which the minister of the parish is entitled to
 “ (*inter alia*) a cow calved, 1 d.”

Evidence being offered to prove, that the 1 d. for
 a cow calved was payable in lieu of milk.

Dauncey, and *Dowdeswell*, objected that the mo-
 dus, as pleaded, was not stated with sufficient cer-
 tainty to admit such proof. It was not stated for
 what tithe the penny was payable, which should ne-
 cessarily appear on the record, and could not be
 supplied by evidence.

Martin, *Benson*, and *Phillimore*, on the other
 hand, contended, that the payment was not laid with
 such uncertainty as to preclude the evidence; that
 it was sufficient so to lay the money-payment, as
 that evidence might be given to show for what it
 was paid; the sum is certain, and the animal is
 certain; it is so expressed in the terriers delivered
 in by the vicar, who must be taken to have known
 for what it was payable. A cow calved, means a pro-
 ductive cow, as contradistinguished from a barren
 cow. The produce is milk, and that is the titheable
 matter. It is therefore set up for milk, and is suf-
 ficiently certain to apprise the vicar of the point to
 which he is to direct his interrogatories.

In an answer to a bill for tithes, moduses are not
 required to be so strictly laid as in bills to establish
 them. In the case of *Mallock v. Browse* (a), the

(a) Ambl. 423.—3 Gw. 905.

modus

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modus was set out in a much more imperfect manner ; it was there pleaded to a demand of tithes of apples, and consisted merely of "cyder, 2*d.* a hogs-head," and was not stated to be in lieu of tithe of apples. On the objection of uncertainty being taken, Sir *Thomas Clarke*, the then Master of the Rolls, said, that if it appears that a pecuniary payment was made for any sort of tithe, the Court will help the imperfection in the manner of setting out the modus, and put a sense upon the words ; and an issue was directed to try whether the modus, as laid, was payable in lieu of tithes for cyder apples.

[*THOMSON, Chief Baron.* In that case the modus was substantially laid as for tithe of apples ; for it was said subsequently, in the answer, that tithe of apples was not payable in kind ; and it is a common mode of paying for apples. There is nothing in the answer in this case as to the tithe of milk not being payable in kind.]

It was then urged, that it was manifest that the vicar knew to what points to examine the defendant's witnesses on the modus, as laid, because he had prepared cross-interrogatories ; but as they had not been used, the Court would not allow them to be read.

Dauncey, about to reply, was stopped by the Court.

THOMSON, Chief Baron. The objection here is, that it is not said in respect of what titheable article this payment was made. It is not said whether it is

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a modus for milk or for calves, or for what ; and the subject-matter, in respect of which a modus is claimed, must in all cases necessarily be stated. The mistake, I perceive, has arisen from copying the terriers *verbatim*, whereas the custom should have been properly stated, and the terrier might then have been applied in evidence. The omission of the article to be covered by the modus renders it totally void, for uncertainty. It is a substantial defect which no parol evidence can be admitted to supply.

GRAHAM, *Baron*. I agree that much greater latitude is allowed in laying moduses in answers than in bills, though I think that that has led to much inconvenience, answers being drawn with much less precision ; but I have never known it carried to so great a length as to permit it to be so loose as to require evidence to explain it. A penny is said to have been paid, but it is uncertain whether in lieu of calves or milk, or both. It is said to be for milk ; and then it might be a question, whether it is meant to cover milch cows bought without calf.

In the case cited the subject of the modus was expressed, but here there is nothing stated.

WOOD, *Baron*. I am of the same opinion. I think every modus should be stated with some degree of certainty, though, perhaps, if that can be collected from the whole of the answer, it might be sufficient. Here the rest of the answer does not explain it, and it would be quite impossible to frame an issue.

RICHARDS,

RICHARDS, *Baron*. However one may be surprised at the case in *Ambler*, still, enough certainly appeared, from the whole of the answer in that case, to show to what subject the modus applied. It could only have been payable for apples. I agree with my brother *Graham*, as to the inconvenience of laying moduses loosely in answers, though I should hold myself bound by decisions. But there is not a word here of milk, and there is no reference in this answer to any titheable matter to which 'cow calved' can apply.

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BERTIE v. BEAUMONT.

1816.

Monday,
13th May.

THE plaintiff, rector of *Buckland (Surry,)* filed this bill against the defendant, the lord of the manor and owner and occupier of lands in the parish, for an account of all titheable matters arising from the said lands; charging that the defendant had, during a certain number of years, mowed a considerable quantity of hay, clover, and other artificial grass, on the said lands, and kept a

A modus may exist for artificial grasses, used in the improvement of hay.

Modus of 3d. for a lamb not rank.

Modus of 4d. for every cow, in lieu of the tithe

of milk, not supported by proof of a modus for every cow with calf.

Modus of 1s. for every seventh pig on the 9th day, held good, after some doubt.

An old receipt of a former rector, in the hands of a defendant, for a money-payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, admissible evidence to support a modus. (p. 307.)

As to the custody of the document, see p.p. 308, 309.

A valuation of tithes, made by a surveyor at the instance of the rector, with reference to certain money-payments reputed to have been always made in lieu of such tithes, not evidence to fix the rector with an acknowledgment of such money-payments, unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments. (p. 310.)

considerable

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considerable number of milch cows, and sheep, producing milk, wool, calves, and lambs; and that he also had had within the said rectory a considerable number of colts, pigs, eggs, and poultry, and a considerable quantity of hops, flax, beans, peas, potatoes, turnips, wood, honey and garden stuff, and apples, pears, and other fruits, without having made any satisfaction for the tithes thereof; and that he had, during the same time, fed and depastured divers barren and unprofitable cattle on the said lands, for which agistment tithe had become due.

To this bill the defendant, by his answer, set up the following moduses:—Sixpence an acre for hay, for every acre of ancient meadow land, in lieu of tithe of all grass or hay of such land:—four pence an acre, for every acre of land sowed or planted with any kind of grass seed used for the increase of hay and grass, and the improvement of tillage, if cut or mowed in lieu of tithe of grass or hay of such land:—one shilling for every orchard:—one penny for every garden:—four pence for every cow, in lieu of the tithe of milk:—one penny for every cock, in lieu of tithe eggs:—one penny halfpenny for every sheep or lamb kept and shorn on the said lands, in lieu of the tithe of wool:—one shilling for every seventh pig, or for one pig of every seven pigs, farrowed on the said lands, due on the ninth day:—four pence for every calf, in lieu of the tithe of calves:—three pence for every lamb yeaned or dropped on said lands, in lieu of the tithe of all lambs.

The

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The evidence offered in support of the moduses, consisted of the depositions taken in an old cause of *Parsons* and others v. *Priaulx*, instituted Michaelmas Term, 2d Anne, to perpetuate the testimony of witnesses for the establishment of the moduses of sixpence an acre for ancient meadow; four pence for lands sowed with seed; one shilling for orchards, and one penny for gardens; four pence for every cow with calf; two pence for every barren cow or heifer, in lieu of milk; one penny for a cock, and one penny for a hen, in lieu of eggs: in which many witnesses (some of whom carried it back as far as sixty-five years,) deposed to the money-payments for hay and grass, and refusal of demands made by the receiver of tithes in kind, and that an action had been brought, in which the rector had failed. The witnesses examined on the part of the defendant attempted to prove, that the use of clover seed, and other artificial grass seed, was of very modern introduction in the parish.

The defendant next produced account books of Mr. *Browne*, (a former occupier) headed "Small tithes paid to Mr. *Eyre*," (Dr. *Eyre* succeeded Dr. *Priaulx*, as rector in 1723,) in which were put down the money-payments now set up, as for the small tithes alleged to be covered by them. There were also produced other accounts of tithes paid to Dr. *Eyre*, in the same way, said to be in the handwriting of *Browne*, and of Mr. *Jordan*, who succeeded to his property, and of *Thomas Beaumont*, (the father of the present defendant,) by whom the
estate

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estate was at that time possessed (about 1743;) at the foot of some of which latter account, were receipts purporting to be given for the amount of the moduses by Dr. Eyre, and said to be in his hand-writing. Those accounts were headed, "Small tithes accustomably paid and due to the Rev. Dr. Eyre for the year, &c." (from 1743 to 1775,) and were in the possession of the present defendant, and now produced by his solicitor.

1815.

18th January.

When these receipts (*a*) were offered as evidence, it was objected to them on the part of the plaintiff, that there should be proof given of their being of the hand-writing of Dr. Eyre, who had died so recently as 1775; whereas no attempt had been made to prove it, either by direct testimony, or by comparison with his known hand-writing or otherwise, as had been held necessary on a former occasion in this Court, which had been the subject

* Exhibit "F," one of the receipts to which the objection was taken, and on which the *Lord Chief Baron* particularly commented, was in these words; "Small tithes accustomably paid and due to the Rev. Dr. Eyre, for the year 1766, are as follows," 39 acres of meadow grass, at 6*d.* per acre, "19*s.* 6*d.*; 34 fleeces, at 1½*d.* per sheep, 4*s.* 3*d.*; 2 calves, "at 4*d.* per calf, 8*d.*; 2 pigs, one of seven, due the 9th day, "at 1*s.* per pig, 2*s.*; cock, 1*d.*; orchard, 1*s.*; garden, 1*d.*; "1*l.* 7*s.* 7*d.*" (Then followed a similar account for the year 1767, both in the hand-writing of Thomas Beaumont, making together 5*l.* 11*s.* 9½*d.*, and then the receipt, said to be in the hand-writing of Dr. Eyre.) "April 14 1768. Received of Thomas Beaumont, esq. the sum of 5*l.* 11*s.* 9*d.*, on account of small tithes due at Michaelmas last. Received "by me, Rob. Eyre."

of

of much discussion (*b*); and that being produced by *Beaumont* (the defendant) it did not come from the person to whom it had been given, and was not therefore found in the proper custody, there being no privity between the parties.

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On the other hand it was contended, that the age of the receipts, and their connection with the parties and subject-matter of the present dispute, gave them sufficient authenticity to make them evidence in this cause.

THOMSON, *Chief Baron*. (*Having read the receipt at length.*) The question is, whether this paper, which on the face of it contains evidence of money-payments in lieu of the tithes enumerated in it, is admissible to show that a *Dr. Eyre*, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments, (there being also the negative evidence of no payment of tithes in kind having been ever made,) had given such receipt, and thereby acknowledged such payments.

It is produced by *Mr. Glover*, the defendant's solicitor, who lives in *Buckland*, and he says that he received it from the defendant, for the purpose of preparing his defence. It was not given to this *Mr. Beaumont*, but to another person of the same name, and who, of course, occupied lands in *Buckland*, for none but an occupier could have ac-

(*b*) *Manby v. Curtis*, 1 Price, 225.

quired

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quired such a receipt. That person being of the same name with the present defendant, there is reasonable inference that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient.

It was objected also, that the hand-writing has not been proved; but I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date.

It is supposed that we had decided this point otherwise, in another case on a former day, (*Manby v. Curtis.*) That is not so. The cases are very different. Here the receipt was not given by an agent of the vicar, nor to a person unconnected with the defendant, in whose custody it is found. There was no proof in the case which has been alluded to, that *Smith* was agent of the party whose receipt it purported to be, or that he was not alive; and there were other objections to that paper which I thought very material. In the present case, I think this receipt is admissible.

GRAHAM, *Baron.* The question is, whether the proof of hand-writing in the signature of a receipt can be dispensed with; and I think it clear, that in this case it may. There is only this slight circumstance against it, that it comes from a *Beaumont*, who is not the defendant; but there can be but
little

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little doubt that that *Beaumont* was the father of the present, and that he came by this paper in the course of succession to those rights which his father once had. I certainly do not recollect a case where the proof of hand-writing of a rector to his receipts has ever been dispensed with: but it must often happen that receipts go back beyond the memory of living witnesses; and there is an instance, I think, of a receipt admitted by Lord *Hardwicke*, which was seventy-four years old; and if seventy-four years could make it evidence, a much less time might do so. It may be put, as my *Lord Chief Baron* has put it, on the footing of a deed.

As to the case of the other day, which has been alluded to, there every circumstance which could operate to render the receipt admissible was wanting. I therefore perfectly concur.

Wood, *Baron*. I am happy to concur in what has been already said by the rest of the Court. The case which was before us the other day certainly differed very materially from the present; *a fortiori*, therefore, I think the receipt which has been now produced is admissible evidence, having thought that that was so. Here Dr. *Eyre* is proved to be the rector, and entitled to the tithes expressed to be received from *Beaumont*, a predecessor of the defendant. Now who should have the custody of this receipt but the present defendant? Can we suppose that a *Beaumont* of *Buckland* could be otherwise than interested in it? Such receipts are the title deeds of modus, and are almost the only evidence
which

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which it is capable of. I might say, that title deeds are hardly so strong, for it might perhaps be objected to them, that they are *res inter alios acta*. I am of opinion, that this is clearly evidence.

RICHARDS, *Baron*, of the same opinion.

The evidence was therefore received.

Much parol evidence was then given of the money-payments, and of no tithe in kind ever having been paid, to the knowledge or belief of the witnesses, for articles which the moduses were stated to cover.

One witness (*George Smallpiece*, a surveyor,) deposed, that he had made an estimate of all the tithes, by the direction of the plaintiff, with a view to a composition between him and the occupiers; and that he had made such valuation with reference to the money-payments, as stated in the moduses; and that, had not those money-payments existed, he should have valued the tithes at a much larger sum.

To this evidence it was also objected, that it had not been proved that the witness had been directed by the plaintiff so to estimate the tithes according to the money-payments.

THOMSON, *Chief Baron*. The object of this evidence is to establish the modus, and it cannot be offered with any other view. To be admitted as against the plaintiff, therefore, as evidence of his having acknowledged the money-payments, those payments should be proved to have been communicated

cated to him by the witness, as the criterion of his valuation, on which ground alone can it affect the plaintiff; but that not having been shown, the evidence cannot be received for that purpose.

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GRAHAM, *Baron*. Although it is clear that the plaintiff gave the witness directions to make a valuation of the tithes, it does not appear that he directed it to be made with reference to the money-payments; and therefore the fact cannot be used to affect the plaintiff.

WOOD, *Baron*. Perhaps I do not substantially differ in opinion. There are two questions here, 1st. whether the evidence offered is admissible; and 2dly, what effect it may be permitted to have, if admitted. If put as bringing it home to the rector, or adopting the payments, I think it cannot have that effect, but still it is admissible as evidence.

RICHARDS, *Baron*. It is undoubtedly very important to lay down distinct rules on the admissibility of evidence; but I am clearly of opinion that these depositions are not evidence.

Rejected.

THOMSON, *Chief Baron*, this day delivered the judgment of the Court.—(*Having stated the objects of the suit, and the various moduses insisted on in the defence.*)—The question is, what proof has been furnished of the several moduses; and certainly the

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depositions, in the suit of *Parsons v. Priaulx*, are sufficiently strong as to the existence of the modus for hay and grass, which appears to have been then, as now, the principal object of the suit, or at least the circumstances under which that hay was made. That evidence is clear and distinct as to the payment of the moduses for the hay, according to the different quality, and no objection has been made to them as laid; for though the improvement of cultivation of hay, by the introduction of many artificial grasses, may be modern, yet there were at that time indigenous grasses and seeds, such as clover and some others, which most probably were used in the same manner to improve the hay. But the rector may try that modus if he desires it. The next are, one shilling for orchard, and one penny for garden; then four pence for every cow, in lieu of tithe milk. There is besides, four pence for every calf, laid as a distinct modus, although, in the former suit, the moduses pleaded were four pence for every cow with calf, and two pence for every barren cow or heifer, in lieu of milk; so that in the present suit the defendant goes further; and as the main evidence for the defendant is the depositions in the former suit, the question will be, whether there is evidence to support those two sums of four pence. Some of the moduses in that defence are different from those now set up. There is no mention made among those of cow as distinct from calf; nor is there any such tithe noticed in the accounts, which have also furnished the defendant with some of his principal evidence. The customary payment for pigs is also
noticed,

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noticed, for the first time, in those accounts, to which Dr. Eyre has given effect by signing them.—(*His Lordship went minutely through the exhibits, beginning in 1768, and ending in 1774, and particularly letter F, which is transcribed in the note.*)—

Then there is general negative evidence of non-payment of tithes in kind to Dr. Eyre, during the whole of his incumbency. In the former suits of *Priaulx v. Lucas*, and the cross-bill (*Sir John Parsons v. Priaulx*,) no modus for tithe of lambs or pigs is set up, and the evidence of those payments depends entirely on the accounts between the defendant's predecessors and Dr. Eyre, and those say nothing of a modus for milk. The defendant, too, has divided the modus for milk and for calf into two sums, so that it is not stated as proved by the depositions in the old cause; therefore, on some future occasion, he must lay his defence more according to the truth. At present we cannot direct an issue on the modus for milk. With respect to the three pence for tithe of lamb, we are also under some difficulty with respect to the fact, for there is no evidence given of that payment, except what is to be collected from the accounts which have admitted it. That modus is certainly not set up in the ancient cause, and one would think that the parish, in a suit to establish their rights, would have taken notice of all existing moduses; but that is matter of observation on the evidence. The amount of the modus for tithe of lambs is said to be rank, and that objection has been taken at the bar; and certainly the Court would have had great difficulty on that point,

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after the opinion given by the Lord Chancellor in the case of *Bishop v. Chichester* (c), having the case of *Giffard v. Webb* (d) before him, but for a subsequent determination of this Court, in the case of *Askew v. Greenhow* *, where an issue was directed

(c) 4 Gw. 1320. (d) 4 Br. P. C. 212; and 2 Gw. 708.

1806.

Monday,
7th July.

* In EXCHEQUER TERM.—46 Geo. III.

Askew v. Greenhow. (Decree and Postea.)

Modus of 1*d.* for each lamb, where the number did not exceed four; 1*s.* where the number did not exceed five; 1*s.* 8*d.* where the number did not exceed six; 1*s.* 9*d.* where the number did not exceed seven; 1*s.* 10*d.* where the number did not exceed eight; 1*s.* 11*d.* where the number did not exceed nine; and 2*s.* where the number did not exceed ten; held not rank, and sent to an issue.

Cumberland.—Whereas by a decree made on the hearing of this cause, bearing date 15th May 1805, it was ordered and decreed by the Court, that the plaintiff should forthwith proceed to a trial at Law on the following issue; to wit, whether there was not then and from time immemorial had not been paid and payable to the rector of the parish of *Greystock*, in the county of *Cumberland*, for the time being, yearly and every year, for and in lieu of the tithe of lambs, the several moduses or customary payments following, except as to two houses, one called *Harrison's* tenement, the other called *Threlkeld Hall*; viz. one penny for each lamb, when the number did not exceed four; one shilling where the number did not exceed five; one shilling and eight pence, where the number did not exceed six; one shilling and nine pence, where the number did not exceed seven; one shilling and ten pence, where the number did not exceed eight; one shilling and eleven pence, where the number did not exceed nine; and two shillings, where the number did not exceed ten.

That such issue should be tried on a feigned action, to be brought in the Office of Pleas in this Court by said plaintiff against said defendant, to be tried at the next assizes for *Cumberland*; that the said defendant was forthwith to appear and name an attorney in the said Office of Pleas, accept declaration, and plead to issue therein, so as the same might be tried as directed; at which trial, the depositions of such of the

Summary of the usual proceedings, on the direction of issues out of this Court, to be tried at Law, and on the return of the postea.

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directed to try a modus of three pence for a lamb; and that direction was affirmed on rehearing. The issue was afterwards tried before *Sutton*, Baron, who left it to the jury on the question of rankness, and they, without much hesitation, found against the modus. A motion was afterwards made for a new trial, which was refused, and a decree was pronounced for tithes in kind. As to the actual fact in that case, there was strong evidence made in favour of the modus, both by living witnesses, and by the terriers, signed by the rector, from 1749 to 1773, wherein that mode of tithing lamb had been admitted as here, yet the Court thought it right to send it to trial; and we now think that that will be right in the present case. The modus for pigs also depends on the entry in the rector's

the witnesses taken in this cause, as should be dead or unable to travel to the assizes, should be read in evidence on behalf of the said parties, and the judge, before whom the said trial should be had, was at liberty to endorse the postea, as to any special matter that might arise on the said issue, as he should think proper.

And it was further ordered, that it should be referred to the Deputy Remembrancer to settle the issue, in case the parties should differ about the same; and, for that purpose, all deeds, books, papers and writings, in the custody or power of the said parties, to be produced before the Deputy Remembrancer, (on oath, if required,) and the same to be produced on the trial of the said issue, of which notice should be given. The cause to be continued in the paper of causes till the return of the postea, until which time all further directions to be reserved.

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rector's books, and non-payment of such tithes in kind. Now every seventh pig on the ninth day, would exclude the tithe of pigs, if under that number; and again, of those above seven, if the number were under fourteen: and therefore we have had some doubt, whether we should do right to send such a modus to an issue. It is also one of those not insisted on in the suit in 1703.

As to the articles not covered by the moduses, there must be a decree for the plaintiff, and for milk. As to all the other moduses, there must be issues.

And reciting that the parties having proceeded to such trial in pursuance of the decree, and that the jury had found a verdict against the moduses stated in the issue, and that an order which had been obtained for a new trial had been discharged; on the cause coming on for further directions, the said decree and postea having been opened, and counsel heard, it was ordered, that it be referred to the Deputy Remembrancer, to take an account of what was due to the plaintiff from the defendant for tithes, since 1st January 1800; to make to each party all reasonable allowances in taking the account; defendant to be examined on interrogatories, touching the truth of such account, and the Deputy Remembrancer to be armed with a commission for that purpose, and one or more commissioners to issue into the country for the examination of witnesses, in aid of the account; the Deputy Remembrancer to make his report, and the cause to be continued till the coming in of that report; till which time the consideration of the costs in Equity to be reserved, and the deputy remembrancer to tax the plaintiff his costs at Law, to be paid by the defendant; all papers, &c. to be produced, &c. as before directed, on the trial of the issue. *Vide Bedford v. Sambell*, 3 Gw. 1058.—*Pyke v. Dowling*, ib. 1166.—*Twells v. Welby*, ib. 1192.

issues. The costs must be allowed for all the tithes recovered ; and as far as they relate to the moduses to be tried, they must wait the event of the issues, as matter for our consideration when the cause comes on for further directions.

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The KING v. HENRY ELLIS ST. JOHN.

(Demurrer)

On a Writ of Extent against *H. B. Deane*, esq.

1816.

Tuesday,
14th May.

ON this writ of extent, tested the 5th January 1815, returnable 3d February 1813, reciting that *H. Boyle Deane*, and certain other persons his sureties, were indebted to the Crown by bond, dated 24th September in the 48th Geo. III, in 29,000*l.*, and also, in other sums by other bonds of subsequent dates, an inquisition was taken at *Reading*, whereby it was found that the said *H. B Deane*, on the 24th May 1812, was seised in his demesne, *D.* by articles, in consideration of his intended marriage, bearing date in 1796, covenants to settle certain lands, to be purchased with a certain sum of money, to uses (in strict settlement.) In 1808 he enters into bonds to the Crown. In 1812 he purchases lands (generally) in fee, and a mortgage term is assigned to a trustee to attend the inheritance, and the estate is then settled (in strict settlement) to the uses declared by the said articles, under which *D.* himself takes only a life-interest. *Held*, that the term does not protect the inheritance of the fee against the Crown's debt due from *B.* on the bonds, the settlement being voluntary, and the particular estate not being specifically bound by the deed of 1796.

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as of fee, of and in certain messuages and premises in the parish of *Hurst* in the county of *Berks*, which were conveyed to him and his heirs absolutely, by lease and release of the 13th and 14th May 1812; the release made between *Thomas Smith*, 1st part; *Joseph Hatt*, and *Paul Holton*, 2d part; *Mary Cowderoy*, 3d part; *John Barfield* of the 4th part; said *H. B. Deane*, 5th part; and *Henry E. St. John* of the 6th part. And it was further found, that the said *H. B. Deane* continued and was in possession on the 5th January 1815.

St. John pleaded, that before the teste and issuing of the said extent, and before the said *H. B. Deane* had any thing in the several hereditaments and premises in the plea after-mentioned; to wit, on the 22d February 1800, one *William Cowderoy Whitfield* was seised in his demesne, as of fee, in the several messuages, tenements, hereditaments, and premises, in the said inquisition particularly described, and therein mentioned to have been conveyed to the said *H. B. Deane* and his heirs absolutely, by indentures of lease and release of the 13th and 14th May 1812, parcel, &c.; and that said *Whitfield* being so seised thereof, did afterwards, on said 22d February, by indenture, demise to *Daniel Headland*, his executors, administrators and assigns, said premises for the term of one thousand years; by virtue of which demise, said *Headland* entered 23d February, and being so possessed, died intestate on 1st March 1804, and administration was granted to *Jane Headland*. That afterwards, on 25th March, by a certain other indenture,

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indenture, between *Francis Lockey* of the 1st part, said *Jane Headland* of 2d part, said *Whitfield* of 3d part, *Thomas Smith* of 4th part, and *John Barfield* of the 5th part, said *Jane Headland* did assign said premises to said *John Barfield*, for the residue of the said term, upon trust, for securing to *Thomas Smith* a sum of money and interest, and subject thereto, in trust, to attend the inheritance, and to protect the premises from mesne incumbrances. That afterwards, on 14th May 1812, by indenture between said *Thomas Smith*, 1st part; *Joel Hatt* and *Paul Holton* of 2d part; *Mary Cowderoy*, single woman, of the 3d part; said *John Barfield* of the 4th part; said *H. B. Deane* of the 5th part; and said *Henry Ellis St. John* of the 6th part, the said *John Barfield* did assign, transfer and set over unto the said *Henry E. St. John*, his executors, administrators and assigns, the said messuages, tenements, &c. to hold the same unto the said *H. E. St. John*, &c. from thenceforth, during all the rest, residue and remainder of the said term then to come, &c. in trust, nevertheless, for the said *H. B. Deane*, his heirs and assigns, and to be assigned and disposed of as he or they should direct or appoint; and in the mean time to attend, wait upon, and go along with the freehold and inheritance of the said premises, to bar, dower, and protect and defend the said hereditaments from mesne incumbrances subsequent to the creation of the said term. By virtue whereof, the said *H. E. St. John* on, &c. entered, &c. and was, and continually from thence hitherto hath been, until the taking and seizing thereof by the said sheriff,

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sheriff, lawfully thereof possessed. And the said *H. E. St. John* being so possessed, and the said *H. B. Deane* being so seised thereof, as in the said inquisition mentioned, afterwards on the 29th June 1812, said *H. B. Deane* did, by indenture of bargain and sale, for the considerations therein mentioned, bargain and sell said premises, &c. unto *George Deane* and *John May*, to hold the same to them and their assigns from, &c. for one whole year, by virtue whereof, and by force of the statute, &c.; and afterwards (on 30th June) the said *George Deane* and *John May* being so thereof possessed, by a certain other indenture made between said *H. B. Deane* of the first part; *Lucy Deane*, widow and relict of *Henry Deane*, deceased, and the said *H. B. Deane*, and *Elizabeth* his wife, then late *Elizabeth Wyborn*, spinster, of 2d part; *George Deane* and *John May*, 3d part; and *Ralph Deane*, and said *H. E. St. John* of the 4th part, said *H. B. Deane* being so seised as aforesaid, for the considerations therein mentioned, did grant and confirm unto said *George Deane* and *John May*, and their heirs, the said several messuages, &c. to hold to them, their heirs and assigns, for ever, to the intent that the same might be settled to the several uses, and upon the several trusts, and under and subject to the several powers, mentioned, expressed, and directed to be declared, in and by a certain indenture of settlement, bearing date the 2d day of *September* in the year 1796, or as near thereto as the death of the parties, the change of interests, and other intervening circumstances, would admit. And it was by the said indenture

indenture of release further witnessed, and thereby covenanted, declared and agreed between all the said parties thereto, and the said *H. B. Deane* did thereby direct and appoint that the said *H. E. St. John*, and his executors and administrators, should thenceforth stand seised, and be possessed of the said term of one thousand years, In trust for the said *George Deane* and *John May*, their heirs and assigns, to attend, &c. and to preserve, &c. And said *H. E. St. John* further saith, that the said several uses and trusts mentioned, expressed, and declared in and by the said indenture of settlement, bearing date 2d September 1796, and mentioned and referred to as aforesaid in said indenture of 30th June 1812, were as follows; that is to say, To the use of said *Henry Deane* and his assigns, for life (without waste;) remainder to the use of the said *Lucy Deane* his wife, and her assigns, for life; remainder to the use of the said *H. B. Deane* and his assigns, for life, (without waste;) remainder to the use of the said *Elizabeth Wyborn* and her assigns, for life; with remainder to the use of the said *George Deane* and *John May*, and their heirs, during the natural lives of the said *H. Deane*, *Lucy* his wife, *H. B. Deane*, and *Elizabeth Wyborn*, and the life of the longest liver of them, Upon trust, to preserve, &c. but nevertheless to permit and suffer the said tenant for life to receive and take the rents and profits of the messuages, lands, tenements, and hereditaments, to be purchased with a certain sum of £, and immediately after the decease of the survivor of them, to the use of and in trust for the child, if only one,

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one, or if more than one, then all and every, or (exclusive of the other or others of them) any one or more of the children of the said *H. B. Deane*, on the body of the said *Elizabeth* lawfully to be begotten, or the issue of all or any of such child or children to be born in the life-time of the said *H. B. Deane* and *Elizabeth Wyborn*, with such limitations, over and upon such contingencies, and subject to such conditions and restrictions, as the said *H. B. Deane* and *Elizabeth Wyborn* jointly, during their lives, by any deed or instrument in writing, to be executed in presence of two credible witnesses, should absolutely, and without power of revocation and new appointment, to be as therein mentioned, jointly direct, limit or appoint; and in default of such direction, limitation and appointment, and subject thereto, and as to such part or parts of said messuages, &c. to be purchased with the sum of*l.* therein mentioned, and also of the estate and interest therein, to which such joint direction or appointment should not extend, then as the survivor of them the said *H. B. Deane* and *Eizabeth Wyborn*, notwithstanding her coverture by any future husband, by any deed or instrument in writing, executed in the presence of two credible witnesses, or by his or her last will and testament, signed and published in the presence of three credible witnesses, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, to the use of the first son of the said *H. B. Deane*, on the body of the said *Elizabeth Wyborn* lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing,

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issuing, with remainder to the use of the second, third, fourth, and fifth, and all and every other son and sons of the said *H. B. Deane*, on the body of the said *Elizabeth Wyborn* to be lawfully begotten, severally, successively, and in remainder, one after the other, as they respectively should be in seniority of age and priority of birth, and the heirs male of such sons lawfully issuing, with remainder to the use of the daughter, if only one, and if more than one, then all and every the daughters of the said *H. B. Deane*, on the body of the said *Elizabeth Wyborn* to be lawfully begotten, share and share alike, as tenants in common, with benefit of survivorship in manner therein mentioned, with remainder to the use of the said *H. B. Deane*, his heirs and assigns for ever. And the said *H. E. St. John* further saith, that after the making of the said indenture, bearing date 30th June 1812, the said *H. B. Deane* and *Elizabeth Wyborn* intermarried, and the said *H. Deane* and *Lucy* his wife respectively died, to wit, on the 2d day of September 1796, at *Westminster* aforesaid; and that before and at the time of the issuing and teste of the said writ of extent, the said *H. Ellis St. John* was, and from thence until the issuing thereof, hath been possessed of, and still is entitled to the said several messuages, &c. for the residue and remainder of the said yet unexpired term of one thousand years therein, in trust for the said *George Deane* and *John May*, their heirs and assigns, to attend, &c. in order to preserve, &c.; and this the said *H. E. St. John* is ready to verify: Wherefore he prays judgment, and that the hands
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of our said Lord the King be amoved from the possession of said messuages, &c. whereof, &c.

Demurrer and joinder.

Nolan, in support of the demurrer, stated the question to be, shortly, whether the trustee of the term assigned to attend the inheritance, is entitled to set it up as an available claim against the Crown, and thereby protect the inheritance of the Crown debtor's estates from the Crown's debt; and submitted, that whether it were a legal or trust estate, it would be affected by a debt due to the Crown.

He admitted that if the King's debtor, possessed of a term of years of any chattel, real or personal, should dispose of it to another, *bona fide* for a valuable consideration, the sale would bind the King, on the authority of *Fleetwood's* case (*e*).

But he submitted, that it could not be the effect of the conveyance of the term to the uses of the settlement of 1796, that it should operate to protect the inheritance against the debt due to the Crown; and he cited *Ford* and *Sheldon's* case (*f*), where it is held, that "if an account-
 " ant to the King purchase lands in the names
 " of others, the King shall seize those lands
 " for money due unto him;" and also Sir *Edward Coke's* case (*g*), which was this: Sir

(*e*) 8 Co. 171.

(*f*) 12 Co. 2.

(*g*) Godbolt's Reports, 289.

Christopher

Christopher Hatton, whilst entitled by grant of Queen *Elizabeth*, to the reversion of the office of remembrancer and collector of the first fruits, being seised in fee of divers manors, lands, &c. covenanted to stand seised thereof to the use of himself for life, and afterwards to the use of his sons severally in tail, remainder to the heirs of his eldest son in fee, with power of revocation during life. Having afterwards become possessed of the said office, and thereby indebted to the Queen, the question was, whether those lands might be extended for the debt, and it was held that they were. *Doddridge*, Justice, and *Tanfield*, Chief Baron, were of opinion, that Sir *Christopher Hatton* having the fee, the conveyance being revocable during his life, the lands were extendible till his death; and *Hobart*, Chief Justice, considered it not material that the inquisition should find the deed to be with power of revocation, and he held, that a revocable conveyance was sufficient to bind the parties themselves, but not the King, and that the lands were liable, into whose hands soever they come.

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It cannot be necessary to show, that where a term attends the inheritance, it is considered as part of it, and subject to the same conditions. It is no longer a term in gross.

In the *Attorney General v. Sands (h)*, it was held, that a term attendant on the fee is not forfeitable. *Hale*, Chief Baron, says, in that case,

(h) *Hardres*, 488.

“ A trust

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“ A trust of a term that follows the inheritance,
 “ may be resembled to a box of charters, which go
 “ to the heir with the land that they concern, 4 *H.*
 “ 7 *W.*; but if the owner grant them over, then
 “ they shall go to the executors of the grantee.”

There is also a case in *Precedents in Chancery*, which is precisely in point. *How v. Nicholl (i)*, where a man having a term in gross, purchased the inheritance; and the term was declared to attend the inheritance. Then he becomes receiver of the King's revenue. He was held liable from the time of his becoming receiver, and that the King should have the benefit of the term; but (it is added) if the term had been mortgaged to one who had no notice of its attending the inheritance, he should have held it against the King. In this plea it is not alleged that *St. John* had no such notice.

In the case of the *King v. Smith (k)*, the debt was by simple contract.

Richardson, in support of the plea, submitted, that a term, though assigned to attend the inheritance, is not incapable of being severed for some purposes; and that the purpose for which this term had been assigned was one of those, and would be protected by that assignment, which was for the interest

(i) *Prec. in Ch.* case 111, p. 125.

(k) *Wightwick's Rep.* 34.—In that case, the principal authorities on the point of the Crown's debt affecting the debtor's lands, in the hands of a purchaser, are brought together.

of *H. B. Deane's* wife, and the uses of the settlement in 1796, although the life-estate, and all beneficial interest of *H. B. Deane* in the lands, might be affected by the extent. According to the doctrine in *Willoughby v. Willoughby* (*k*), the uses of the settlement of 1796 (being long before *Deane* had entered into any engagement with the Crown,) would be protected by the assignment of the term. The marriage was a valuable consideration, the articles and assignment were *bonâ fide*, and there was no notice of the Crown's debt. A judgment creditor would be precluded under the same circumstances, and the Crown cannot be considered as in a better situation.

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THOMSON, *Chief Baron*. The settlement of 1812 was voluntary, and there is no covenant in the articles of 1796, which specifically binds these lands. The assignment of the term therefore to *St. John*, cannot defeat the right of the Crown.

Per Curiam.

Judgment for the Crown.

(*k*) 1 T. R. 763.—Coll^r. Jur^s. vol. 1. p. 349.

Regula Generalis.

THE COURT ordered, That from this day, the justification of bail in open Court should be taken at the sitting of the Court, before the other ordinary business.

Wednesday,
15th May.

SHAW v. JOHN TYTHERLEIGH (sued by the name
of JOHN TYTHER LEIGH.)

1816.

A *subp. ad resp.* and attachment for want of appearance, in both of which there is a mistake in the defendant's surname, not sufficient ground for a rule to show cause why the proceedings should not be set aside, although the defendant give the plaintiff notice on being served with process, that he will move the Court to set it aside if proceeded in, and tender the plaintiff his demand.

DAUNCEY moved to set aside the proceedings in this cause, for irregularity. The defendant had been served with a *subp. ad resp.* in the name of *Leigh*, (as above,) returnable in fifteen days of *Easter*. On the 11th of *April* he gave the plaintiff notice, that if he proceeded in the action, the Court would be moved to set aside the proceedings on the ground of the misnomer; and at the same time tendered him the full amount of his demand. The plaintiff had delivered in a bill of particulars of his demand, wherein he had called the defendant by his right surname. On the 25th day of *May* instant, the defendant was attached for default of appearance, by warrant from the Sheriff of *Stafford*, by the name of *Leigh*.

The Court refused to grant the rule.

Sir

Sir F. CUNLIFFE, Bart. and another, v. TAYLOR
and others.

1816.

Monday,
20th May.

THE plaintiffs, as trustees of Sir *Richard Brooke*, lessee of the tithes under the Dean and Chapter of *Christchurch, Oxford*, who were seised of the rectory and parsonage of *Runcorn*, in *Cheshire*, filed this bill against the defendants, occupiers of lands in the several townships of the parish of *Runcorn*, and the vicar of the said parish, for the tithe of potatoes.

The lessee of a rector, in whose lease there is an exception of various small tithes *nomi- natim*, and of all the tithes belonging to the vicar, is not entitled to tithe of potatoes, although he has always received some of the small tithes in kind, not mentioned in the lease, *speciatim*, either as demised or excepted, and particularly for geese and pigs: his general right being generally abridged by the operation of the particular exceptions in the lease, and which was held to carry

The defence set up was, that the vicar of the parish was entitled to the tithe of potatoes, if titheable.

The evidence for the plaintiff consisted of the lease of the rectory *, and parol testimony of having uniformly

* The lease was for three lives (rendering rent) of all that their rectory or parsonage of *Runcorn*, in the county of *Chester*, and all their houses, barns, glebe lands, tithes, fruits, profits, advantages, commodities and appurtenances whatsoever, to the said rectory belonging; except, and always reserved unto the said Dean and Chapter and their successors, the gift, advowson and patronage of the vicarage and parish church, and the presentation of a clerk to be vicar thereof; and

the tithes of articles of modern introduction to the vicar; for that it was not to be inferred, from the lessee of the rector having received certain articles of small tithes, that he is entitled to take tithe of potatoes, although the vicar was not entitled to all the small tithes, nor had enjoyed the tithe in dispute.

The ecclesiastical surveys are admissible to prove an ancient endowment, and, aided by perception of small tithes, (though not of all,) will give a vicar a right to tithes of articles of modern introduction against the lessee of the rector.

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uniformly received the tithe of geese and pigs, colt, and some few other trivial small tithes, and smoke-penny and egg-money, and in some instances the tithes in question, by composition; but it also appeared, that on a remonstrance from the vicar, that tithe was no longer demanded.

On the part of the defendants, the vicar proved perception of many articles of small tithes, (all the witnesses admitting that the tithe of geese and pigs was payable to the rector, and was paid to the lessee,) particularly calf, wool, lamb, and three-pence for man and wife; and that he (the vicar) had lately, in some instances, received the tithe of potatoes.

Martin,

and all lands, tenements, meadows, rents and services, with their appurtenances, in *Newton* near *Daresbury*, in the said county of *Chester*; and also all manner of grain and sheaves of corn or grain, increasing, &c. in the villages, hamlets, or fields of *Newton* aforesaid, *Hull*, *Appleton* and *Over Whitley*, in the said county; and all hay and grass titheable in *Newton* and *Hatton*, near *Daresbury* aforesaid; and also all and singular the Lenten-tithes and profits coming thereby, of the Lent-book or Lent-roll, in *Daresbury* aforesaid, parcel of the said rectory; and all the tithes, as well of corn and sheaves of corn, and grain, and grass, and hay, in *Acton Grange* and *Daresbury* aforesaid, and also of a certain piece of land (therein particularly described) in or near *Acton Grange*; and also all timber trees, woods and underwoods, on the said demised premises, with liberty to fell and carry away the same; and also except all the tithes of wool, lamb, flax and hemp, and all the offerings or oblations at *Easter*, and all tithe calves yearly coming, renewing, arising, or increasing of or in the titheable places of *Runcorn* aforesaid, or any part thereof; and also all and all manner of tithes, predial or personal, coming, growing, renewing, arising or increasing of or in the town

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Martin, and *Cooke*, for the plaintiffs, put the case on the principle of a rector having a right to all the tithes to which the vicar could not show himself clearly entitled; and submitted, that the exceptions in the lease were so minute and particular, as to prove that the lessee was entitled to all the tithes which were not *expressly* reserved, as the Dean and Chapter had demised, as largely as they could, *all their rectory*; and against the lessee's right, the vicar must prove himself entitled by endowment or perception to this particular species of tithe, or it must be taken to remain in the rectory, and to have been demised to the lessees.—That usage was the only ground on which the vicar could, in the present instance, rest his case, as the ecclesiastical survey only

town, village, or fields of *Weston*, in the parish of *Runcorn* aforesaid; and all and all manner of other tithes whatsoever, which the then vicar or any other vicar for the time being of the parish church of *Runcorn* aforesaid, in right of his or their vicarage of the same church, did then or at any time theretofore had peaceably or quietly received, perceived, possessed, or taken and had, or which to the then vicar or any other vicar for the time being of the said parish church of *Runcorn* aforesaid, in right of his or their said vicarage, then were or at any time theretofore, by ancient composition, or any custom or prescription within the said parish of *Runcorn* aforesaid, or the members thereof, had been belonging or in anywise appertaining.

The other documentary evidence consisted of certain leases formerly granted by the rector, and the accounts of the bailiffs of the monastery.

On the part of the vicar, an ecclesiastical survey was produced, (recognizing the existence of the vicarage, and an endowment of small tithes and oblations,) and terriers.

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only proves (and that not satisfactorily) that an endowment had formerly existed, but does not show of what articles; and therefore his right cannot be carried beyond the usage against his rector, who is never called on to show his right, which is general. — That the reservations made in the lease of certain titheable articles by name, must not necessarily be taken to have been made in favour of the vicar; nor can they be used in diminution of the rector's right, without proof of perception. There is also in this case strong evidence of usage in favour of the plaintiffs, for they have constantly received tithe of pigs and geese, which are small tithes, and in some instances several other vicarial tithes; and the perception of such small tithes is the criterion of the right to tithes of modern introduction, and is the only medium of deciding the question to whom such tithes belong and are payable. And as *nonuser* will not defeat a vicar's right, so also it is no answer to the claim of a rector; and there is no difference made in the cases, between a lay and an ecclesiastical rector. If, in this case, where both rector and vicar prove perception of some of the small tithes, there should be any doubt to whom the newly introduced articles are payable, the rector would be entitled to the benefit of that doubt, and would be entitled to an issue, if not to a decree.

Dawncey, and *Whetherell*, for the vicar, contended, that a vicar having proved his endowment, stood, as to vicarial tithes, in *loco rectoris*, and on the same common law right, and thus put the lessees of his rector to strict proof of their title; and

and it is no answer to a vicar, to say that he has never received any particular species of small tithes.

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The case of *Kennicott v. Watson* (a) is precisely the same as the present; and the parties here have relied, on both sides, on similar proofs, the grant of the rectory on one hand, and the ecclesiastical survey on the other: and the argument proceeds on the same question, of what tithes are due to the vicar, and what to the rector. In that case, "*Vicaria*" was held to carry all small tithes, and that the vicar was entitled to demand, under his endowment, those which had never before been paid. The rector's right to any small tithes, must arise in consequence of some special reservation, and it ought to be shown to what particular articles that reservation was applicable; and if usage be the only means of that proof, it must be confined to the usage, and cannot go beyond it. In this case, then, the rector's right would be confined to geese and pigs, and some small personal dues.

Martin, in reply, distinguished the present case from *Kennicott* and *Watson*. In that case the rectory had not been granted, as in this, but merely the tithe of corn and grain. There, too, it was shown, that no claimant had ever received any small tithes in derogation of the vicar's right; here the plaintiff has enjoyed some of the vicarial tithes. In that suit the rector was not made a party; and it is

(a) 2. Price's Rep. 250.

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quite a different thing, where the vicar's right is set up against the rector, or merely against the landholder. The only question in that case was, whether a vicar, having a right to small tithes generally, was not entitled to claim agistment from the occupier, and that was the whole; and although the discussion occupied several days, it might have been disposed of in a very short time. If the rector had been a party there (although that was argued as a last resource,) no one could be dissatisfied with the decision. The usage was insisted on there; and without it, the ecclesiastical survey would not have been held to have been tantamount to an endowment. That case is therefore considerably in favour of the present claim; for it decides, that a vicar cannot prevail against a rector, but by proof of enjoyment.

THOMSON, *Chief Baron*, (having stated the case, and the plaintiffs title, as trustees for the lessee for lives, the effect of the documents deducing the title of the lessors from the priory of *Norton*, and the parol evidence of perception,) commented much on the peculiarity of the lease having so many exceptions; and, amongst other observations, his Lordship remarked, that some of those reservations operated strongly in favour of the vicar, particularly the exception of all the tithes of wool, lamb, flax and hemp, and all the offering-money or oblations at *Easter*, and all tithe calves yearly coming, &c. in the titheable places of *Runcorn*; and all and all manner of tithes whatsoever, which the then vicar or any other vicar for the time being of the parish church of *Runcorn* aforesaid,

in

in right of his or their vicarage of the same church, had then or at any time theretofore peaceably and quietly received, perceived, or taken and had, or to them in right of the said vicarage then and theretofore, by ancient composition or any custom or prescription belonging,—plainly (said his Lordship) alluding to some species of tithes of which the vicar had been formerly endowed, though there is nothing said as to tithes so specially excepted in the lease. That lease was for three lives; and here it may be proper to mention a piece of evidence of great importance is this defence. That is the ecclesiastical survey, made when the rectory belonged to the religious house, by which this vicarage clearly appears to have been endowed at that time. And that document shows the endowment to have been general, from the words “*decimas minutas & oblationes*,” comprehending more than wool and lamb, and the other tithes specified in the reservation; and is therefore sufficient to put the rector to proof of a title to the tithe claimed. And those surveys are of great authority, to show of what the vicarage consisted at the time when they were taken. Then the accounts of the bailiffs, on the dissolution of the monastery, are used to show that the monastery had some of the small tithes. An observation was made on that, as accounting for the rector receiving tithes of this description.

The plaintiff then read the depositions of his witnesses, to show something of a permanency of small tithes by the lessee and his ancestors, particularly pigs and geese.—(His Lordship then went
at

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1816. *at large into the parol evidence of perception of tithes by the plaintiff, as far as it went to prove perception of small tithes in kind.)*

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The defendants also produced parol evidence of a strong nature, to show the vicar's receipt of many sorts of small tithes in the different parts of the parish.

On this evidence the Court are to decide, whether the plaintiff, as lessee of the rectory, has made out a title to demand from the defendants the tithe of potatoes. It is clear that the lease contains no particular grant of any small tithes whatever; and it appears, that all that the monastery had was the great tithes, and some Easter-rolls, and pigs and geese. As to the rolls, the lessee cannot derive title under them, because they are expressly excepted in the lease. It appears by the ecclesiastical survey, that the vicar was endowed generally of small tithes and oblations, and that would be sufficiently comprehensive to carry all the small tithes that then existed; and all titheable articles of modern introduction would follow the right to such small tithes in general: and therefore the rector is called on to show an adverse title.

His strongest evidence for that, is his having received the tithe of pigs and geese. There is no exception of those articles in the lease, and that may account for his receipt of them; and, on the expiration of the lease, the college will become entitled to them: but it is by no means sufficient
to

to infer, from the plaintiff's having received such tithes, that he is therefore entitled to all small tithes which have not been received by the vicar. The reservation in the lease of the small tithes payable to the vicar, is express; and whether any of the small tithes were excepted as due to the vicar, or as not due to the college, it makes against the lessee's claim either way. On the whole, therefore, we think it is plain, that in this case the rector has no title to this species of newly introduced tithe. The documentary evidence is entirely against the plaintiff; and the usage in his favour, as far as it goes, is explained. His perception of other tithes was confined to his own tenants only; and, after a remonstrance on that account from the vicar, he received them no longer.

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This is not, therefore, the case of a rector claiming generally, and having a general *prima facie* right to all the tithes; because the instruments, confirmed by the usage, show that his right was limited, and that so clearly, as to make it unnecessary to send the case elsewhere for the sake of further enquiry; and therefore we shall dispose of it at once, by dismissing the rector's bill, with costs.

The

The Honourable and Reverend PIERCE MEADE,
Clerk, and others, Devisee and Representatives of
the Bishop of *Dromore*, deceased, v. CONINGSBY
NORBURY, Esq.

1816.

Monday,
20th May.

(By original and supplemental Bills.)

A grant of the
tithes of land
will not be
presumed
from long
non-payment,
although the
lands be
shown to have
been once in
the possession
of a former
lay-impro-
priator, un-
less some evi-
dence of the
existence of
a grant be
offered, or
enjoyment of
the tithes be
shown by at
least some-
thing like
actual per-
nancy, or a
dealing with
the tithes as
owner.

THE original bill filed in this cause, in *Easter*
Term 1810, stated, that the then complainant, the
Bishop of *Dromore* in *Ireland*, was seised of the
impropriate rectory and parsonage of the parish of
St. Nicholas in *Droitwich* (*Worcestershire*.) and
thereby entitled to all manner of tithes, great and
small, arising, &c. within the titheable places of the
said parish.

That from the time of plaintiff's seizin, the de-
fendant held and occupied a certain farm and lands
in the said parish, consisting of about thirty-three
acres, for which he had regularly paid tithe by an
annual composition, till *Michaelmas* 1807; but that
since that time he had refused to pay the plaintiff
such composition for the small tithes: and that,
besides the said lands, the defendant occupied other

Nor will evidence of retainer only, be sufficiently strengthened to support such
a presumption, by its being shown that a former impropriator had declared the lands
in question to be exempt from the payment of tithes, or by instances of excep-
tion of the tithes in leases, by the impropriate rector.—WOOD, B. *dissentiente*.

A church being void and delapidated, is no ground of discharge from the pay-
ment of small tithes to the impropriate rector, on the notion of an agreement having
been entered into between the rector and the parishioners, by which the ecclesi-
astical duties have been dispensed with in consideration of an abandonment of
the small tithes.

lands

lands called the *Lower Friars*, (about seven acres,) on which he had reaped and mown grain, pulse, hay, and clover, and had agisted barren cattle, the tithe of which he had not paid.

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Prayed an account and decree for the single value of all the small tithes from, &c.

The defendant, by his answer, denied the title of the plaintiff to all tithes as impropriate rector; admitted his own possession of the lands mentioned in the bill, but contended, that the composition which had hitherto been paid, was in satisfaction to the complainant, or his agents, for the great tithes only, and denied that he was entitled to small tithes. And he alleged, that in case any small tithes were payable, the rector would be bound to contribute to the repair of the church, and to provide some ecclesiastical person to perform the duties within the said parish, to whom such small tithes would have been payable, if due at all; and that, as no such person had been provided within memory, there must, therefore, at some former period, have been an agreement between the then impropriate rector and the parishioners, that in consideration of his foregoing the small tithes in the said parish, he should be relieved from the duty of serving and repairing the church. In proof of which (the answer alleged,) there had been no service performed in the said church in the memory of any person living, except in two instances, within the last thirty years, of two persons having been buried in the church-yard; that the church itself was dilapidated,

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dilapidated, and that the tower, with a bell therein, and the outside walls of the old church, were standing till within a few years; but that the walls and bell had lately been pulled down by the orders of the complainant, for the purpose of disposing of them for his benefit; and that the parsonage house had, till about ten years ago, been standing, and was inhabited, but that one of the late lessees of the tithes had since pulled it down and disposed of the materials. And that, in further evidence of such agreement, there had never been any small tithes in kind, or any composition in lieu thereof, paid in the memory of any person living, except that two of the late lessees had demanded and received from some cottagers, or small householders, a trifling composition in lieu of vegetables growing in their gardens; and submitted, that the complainant was not, under the circumstances, entitled to any small tithes, or that if he were, it was his duty to procure the said parish church to be served, and contribute to its repairs, and rebuild the parsonage house.

The defendant also admitted, that he had occupied the lands called the *Low Friars*, and that they were within the said parish of *St. Nicholas*, on which he had cut hay and agisted cattle, and had paid no tithe; but he pleaded an adverse title to the tithes of the said lands, derived by mesne conveyances from the Crown, in whom they had become vested on the dissolution of the priory of the *Augustine Friars* in *Draitwich*, in whose possession they had formerly been, exempting them from

from the payment of all tithes, as well great as small; and they alleged, as evidence thereof, that no tithe had ever been paid for the said lands, either in kind or *sub modo*.

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The parol evidence on the part of the plaintiff (who deduced his title to the impropriate rectory by descent from Sir *John Packington*, to whom, it also appeared, these lands had been conveyed by the original grantees in the reign of Queen *Elizabeth*.) tended principally to show, that both the great and small tithes had been always considered as included in the composition which had been paid to the plaintiff, and as due to him in quality of *lay* impropriator, and not as vicar, or to any other ecclesiastical person, there having been no such person within memory; and that no claim to any of the small tithes had ever been set up by any other person. And several old leases of the great and small tithes, by plaintiff's predecessors, were produced. In some of those leases there was an exception of the tithes of the lands called the *Friars*.

Dauncey, *Roupell*, and *Whetherell*, for the plaintiff, submitted that, in the case put by the defence as to the thirty-three acres, of the church being dilapidated, and no service performed, whence the presumption of an old agreement had been inferred, the endowment, if there had ever been any, would have reverted to the rector: and they insisted, that they could not be driven to that argument, till the defendant had given evidence of a vicarage having once subsisted, and of an endowment; and that, as the case at present stood, the
rector's

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rector's common law right must be combated by the defendant, the plaintiff being admitted to be impropriate rector.

As to the defence of the seven acres being church land, they contended, that the priory of *St. Agustin's* having been one of the smaller monasteries, was not exempt from the payment of tithe; and that as to the exception of the tithes of those lands, in some of the leases from the impropriator, that was so far from proving (as it would probably be contended it did) that he had not the tithes, as to be rather evidence that he had them; for unless he had, there could have been no necessity for excepting them.

Martin, and *Hall*, for the defendant, ultimately admitted, that if the plaintiff's title to the impropriate rectory were thought by the Court to have been proved, the defendant (having no evidence to impugn it) had no defence to the claim, as far as regarded the thirty-three acres.

The question was thereby confined to the claim of tithes for the seven acres, called the *Friars Lands*. To that demand the substance of the defence was, that as an impropriate rector might convey lands free of tithe, the Court would presume, from the absence of proof of tithes ever having been paid for such lands, that they had been originally so conveyed; for it was in evidence, that Sir *John Packington* had purchased the land for which the exemption was now claimed, from the grantees of the Crown, and that he had been himself the impropriator of these tithes; and it was submitted, that the
argument

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argument of the exception in the lease proving a title in the lessor to tithe in the lands excepted, required that it should have been in form of a reservation or keeping back of such tithes. It was much urged, that this defence did not stand merely on non-payment of tithes, (whence alone, perhaps, the Court would not have inferred a grant;) for besides the proof that these lands were once in possession of the lay impropriator, who might, therefore, have granted them free of tithe, it was also in proof, that a former impropriate rector (*Cleveland*) expressly disclaimed all right to tithe of these lands. Thus then stands the case for the defendant. No tithes having ever been paid, coupled with the declaration of *Cleveland*, the former impropriator, that they were tithe-free, (which declaration was proved to have been made to the lessees of the tithes, at the time of their having been let,) and with corresponding exceptions of the tithes in the leases, while both plaintiff and defendant claimed their title, the one to the tithes and the other to the lands, from one and the same person, the Court are now bound to presume that the tithes had been conveyed with the land.

Cur. adv. vult.

The COURT now delivered their opinions, *seriatim*.

20th May.

RICHARDS, *Baron*.—(Having stated the case, and observed, that the plaintiff, as impropriate rector, was *primâ facie* entitled to all the tithes throughout the parish, which he had, in point of fact, received.)—If I understand the answer, of which I have some

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doubt,

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doubt, the defendant contends, that he is entitled to an exemption from tithes; but he offers no evidence to support his right. Then, as to the seven acres, the defence most likely to excite the attention of the Court is, a supposed grant of the tithes of that land to those under whom the defendant claims. The answer at first led me to believe, that the defendant intended to rely on an exemption founded on other grounds.

It does not appear when Sir *John Packington* first became entitled as impropriate rector. Whilst he was, he certainly might have granted the tithes. The seven acres in question were conveyed to him in the 2d *Edw. VI.*, and that conveyance is in existence; but it is clear that he took no tithes by it. Then, as he took nothing but the land by that instrument, the grant of the tithes to him is quite consistent with it. There is no other ground for supposing that the tithes of the seven acres passed with the land, except that of non-payment. Now, prescription in *non-decimando* is no more a valid defence against a lay impropriator, than it is against an ecclesiastical rector. That is the law, and it can only be altered by the Legislature. Tithes are due to some one, unless a legal exemption be shown, and non-payment does not give a legal right of exemption.

Then it is said that this defence is not bottomed in *non-decimando*, but on grant; but in that case the grant must be shown, or some evidence given of its existence: and in an answer, consisting of several defences, it is not enough to say that some person entitled

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entitled to the land and tithe conveyed both, and that that is to be presumed from non-payment. Such a defence, in reality, amounts to no more than *non-decimando*. What evidence would support such a defence, is not the question here, where there is no evidence at all. In all the cases (most of which are noticed in *Strutt v. Baker*) (*a*), there is strong evidence of the adverse claimants being in perception of the tithes, which would otherwise be due to the rector, and of their dealing with them as their own. Here there is no evidence of either one or the other. In other cases the perception has been of that sort which could not have been lawful without grant; but here the sole question is, whether non-payment is evidence of grant.

The case of *Nagle v. Edwards* (*b*) was precisely the case now before the Court. In that case, from the short report in *Anstruther*, where the arguments are not given, we have not the benefit of what was said in that case, though many defences were set up. Mr. *Hall* relied principally on the presumption of a grant; but the Court decided unanimously in favour of the plaintiff, and on the same principles by which I am governed in the present case, which is under precisely the same circumstances.

The short sum and substance of the case is this: here is an impropriate rector who is *primâ facie* entitled to tithes throughout the whole parish. Then there is a spot of land which has paid no tithes. The proprietor claims exemption as general owner. He

(*a*) 4 Gw. 1430.(*b*) 3 Anstr. 702.

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does not prove perception or usage ; and all his defence amounts to *non-render* merely. There can be no doubt about the law on such a case, after the decision in the case of *The Corporation of Bury St. Edmunds v. Evans (c)*.

It is impossible to conceive, if the defendant or those under whom he claims had any such right as is contended for, that there should never have been any such exercise of it as would have shown perception, or something tantamount. I am clearly of opinion, therefore, that the plaintiff, as improper rector, is entitled to tithe of these seven acres of land, unless some stronger defence be set up than mere non-payment.

As to the evidence of the lessees of these tithes, that Mr. *Clieveland* (a former impropriator) had told them that this land was tithe-free, (which is brought forward to give this defence the appearance of not being merely *non-decimando*,) I must observe, it is most extraordinary that none of the instruments signed by Mr. *Clieveland* say one word of this ; and I think, therefore, that such evidence, unsupported by those instruments, is too slight. But suppose Mr. *Clieveland* had said so, it might have been in ignorance, and the law would not allow him to give evidence to destroy his right ; and I mistake this case, if any stress ought to be laid on such a declaration by him.

The lease from the Bishop of *Dromore* executed in 1801, excepting the land in question, is certainly

(c) 2 Gw. 757.

more

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more decisive evidence than Mr. *Cleveland's* declaration ; but it is impossible to think that the bishop meant by that exception to acknowledge that the lands were tithe-free, or that the title to tithe was in some other person ; for there might have been many good reasons for such an exception : such as a wish to take them into his own hands, or, in a case of doubt, not to involve his lessee : and it is not many years afterwards that he files this bill (1809.) The conversation and lease therefore are as nothing in this case.—(Having re-stated the point on which the question depended, and observed that the grant of the land, without more, was rather negative evidence against the supposed grant of the tithes, his Lordship concluded with saying,)—I am of opinion, therefore, that in fact, and in law, this defence, in the absence of other evidence, is nothing more than a plea of *non-decimando*, and as such, not an answer to the plaintiff's claim.

WOOD, *Baron*. I am sorry to be compelled to differ from the rest of the Court, as I do in the present case.

I freely admit, that if the cases of *The Corporation of Bury v. Evans*, and *Nagle v. Edwards*, be founded on the law of the land, I should have nothing to say. But it is those very decisions which I combat, and that because they are not founded on rational and legal principles. They hold a doctrine which would be productive of infinite mischief and injustice to every subject of this country, by depriving them of their rights, derived by succession, after long enjoyment by their ancestors.

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This question is, whether a grant, from persons capable of granting, shall not be presumed from the fact of long enjoyment; and it is on that general principle that I differ. If long usage be sufficient to raise such a presumption in all other cases, why not in the case of tithes. There I take my stand.

It is a most important question for the public, and particularly so to the landholders; and therefore, I shall take the liberty of entering into a review of all the cases, and expressing my decided dissent.

The principal decision is that of *Nagle v. Edwards*, in 1796, and that is similar to the present; I may say, it is precisely the same case. There the Chief Baron *Macdonald* says, that 'it is clear the defence of a grant to be presumed from non-payment of tithes, could never be set up in any shape against an ecclesiastical rector; and that whatever doubt there may at first have been on the point of a lay impropriator having the same advantage, three successive decisions upon it have fully established that there is no difference between a lay and ecclesiastical rector.' On that I shall observe, that the difference is very great; for a spiritual rector could not alienate, and therefore it would be absurd to presume a grant against him; but that is not the case with a lay impropriator. The first case cited in support of the doctrine in *Nagle v. Edwards*, is *Benson v. Olive (d)*, but there was no grant set up there. The plaintiff's title was admitted. The defence was, that the land was exempt, as being parcel of one of the greater

(d) Bunsb. 284.

monasteries;

monasteries; and the Court decided, that the admission of the general right put the defendant upon proving his exemption; and could they decide otherwise? That case, therefore, does not apply to this, or to that of *Nagle v. Edwards*, for it does not decide that long non-payment of tithes will not justify presumption of a grant from the lay rector.

The next is *Charlton v. Charlton (e)*; and I do not deny what is the result of that case, that there cannot be a prescription in *non-decimando* set up against a lay rector, where the defence is so in form: as that 'neither the defendant, or those under whom he claims, have ever paid any tithe, or modus, or composition.' Here then the question is, whether this defence is in substance a prescription in *non-decimando*, for it is certainly not so in form. It is quite a different thing when long usage and enjoyment is set up as evidence, from which a grant is to be presumed, and which, as Lord Mansfield properly says*, may be evidence distinct from a grant.

"There is (says his Lordship) a great difference between length of time, which operates as a bar to a claim, and that which is only used by way of evidence." The next, and most material case, is that of *The Corporation of Bury St. Edmunds and Wright v. Evans*, in 1739 (*f*). In that case the defence appears to be put loosely; but, however that may be, the Lord Chief Baron says (*g*), "Where any man occupies lands, which came to the Crown by the dissolution of religious houses, by virtue of

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(e) 2 Gw. 715.—Bunb. 325.

(f) 2 Gw. 757.

(g) Page 766.

* In the case of *The Mayor of Hull v. Horner*. Cowper, 108.

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“ the statute 31 *Hen. VIII.*, or 32 *Hen. VIII.*, it is
 “ manifest he may insist on a discharge by prescrip-
 “ tion; for,” (he adds,) “ the religious houses having
 “ been capable of a discharge by bull, order, or pre-
 “ scription, the patentees of any part of the posses-
 “ sions belonging to such houses, are enabled, by a
 “ special clause in the Acts, to enjoy the same as
 “ amply discharged from tithes as the ecclesiastical
 “ person did on the dissolution.” Those are the
 principal cases on the subject of prescribing against
 a lay impropriator; but they have been followed by
 several others. It was considered law, in the case of
Lord Petre v. Blencoe (in 1797) (*h*). There the
 defence was length of non-claim, the rectory having
 been in the hands of laymen. In giving judgment,
 Lord Chief Baron (*Macdonald*) says, “ It is now
 “ established by many cases too firmly to be dis-
 “ puted, that mere non-payment is not, even among
 “ laymen, any answer to the demand of tithes.
 “ These determinations are perhaps to be lamented.
 “ I should have liked better to have found, in regard
 “ to tithes, the same principle of decision which re-
 “ gulates the title to every other lay-fee. If non-pay-
 “ ment for any length of time forms no presumption
 “ of a grant of tithes, then the length of enjoyment,
 “ which in all other cases is the best possible title,
 “ serves only to weaken the claim of exemption
 “ from tithes, as the difficulty of tracing its origin
 “ is increased.” That argument, against the doc-

(*h*) 3 Anstr. 945.—4 Gw. 1484. This case was decided
 in 1797, subsequent to all the other cases in the books, except
Berney v. Harvey, 17 Ves. 119, in 1810.

trine

trine now laid down, is unanswerable, although the Chief Baron says afterwards, " But the cases prevent us from deciding on the ground of such a presumption."

Now certainly, if decisions, whether right or wrong, make law, these have done so; but I contend against them, as I have a right to do, because I hold a different opinion. Judges can not legislate, nor have their judgments the force of law, and if doubtful, they should be examined to the bottom, that it may be seen whether they are founded in justice and the law.

In the case of *Jennings v. Lettis* (*i*), Lord Chief Baron *Parker* has certainly carried this doctrine of non-presumption a great way; he says (*k*), " The instrument or deed of exemption, or alienation or discharge, ought to be produced. But then it is objected, shall a man be liable to pay tithes, if he loses his deed of discharge or alienation, so as not to be able to give any legal evidence of it? I am afraid he will." But in the case of *Fanshaw v. Rotheram* (*l*), it is said by Lord Keeper *Henley*, who also holds it to be necessary to produce the deed of exemption, " I would not be understood as if a judge would in all cases expect the production of the very deed or grant of exemption, but the best evidence the nature of the case will admit." And that is

(*i*) 3 Gw. 952.

(*k*) Page 957.

(*l*) 3 Gw. 1179.

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certainly the true rule of law. He then decides that case in favour of the prescription.

Then it is said, that there is no evidence that a grant ever did exist. It may be impossible to give such evidence in very many instances, for deeds will perish, and witnesses cannot be kept alive for three or four hundred years; and it would be monstrous to say, that the proof of the existence of such deeds shall not be supplied by evidence of long usage and enjoyment.

I shall now proceed to show how far the Courts of Law have gone in presuming grants, which they have done from the earliest times :

In the case of *Crimes v. Smith*, in 30th *Elizabeth (m)*, where the validity of the impropriation was questioned because a vicarage had never been endowed, according to the condition of the original grant, (and that appeared from the grant itself) it was held, that it should be presumed that the vicarage, in respect of continuance, was lawfully endowed; and the Court said, "It would be a dangerous precedent to examine the originals of impropriations of parsonages, and the endowments of vicarages, for that the originals of them in time will perish." So that here we are told we may presume every thing from continuance, and why not a grant of tithes. In *Bedle v. Beard (n)*, also, objections being taken to the title to an advowson, it was resolved, that in respect of the

(m) 12 Co. p. 4.

(n) Ib. p. 5.

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ancient and continued possession, it should be intended that there was a lawful grant of the King in fee, and that all had been done which might make the ancient impropriation good, and that because (as it was said) records, letters-patent and other writings consume, or are lost or embezzled; for otherwise ancient and long possession would hurt the title of the owners of the rectory. There it might have been objected, that the Crown's grant, being matter of record, could not be prescribed for; and if you may prescribe against the Crown itself, why not against the grantees of the Crown? The principles of those cases are equally applicable to the case now before us.—(His Lordship then took a minute view of the cases of *The King v. Carpenter* (o)—*The Mayor of Hull v. Horner* (p)—*Powell v. Millbanke* (q)—*Orenden v. Skinner* (r)—in which last Lord *Kenyon* said he must tell the jury, that from a possession of two centuries and a half they might presume any conveyance from the dean and chapter; and he was of opinion that the tithes did pass, although there were no words of conveyance of the tithes—and *Lady Dartmouth v. Roberts* (s), as having established the principle of long usage and enjoyment being presumptive evidence of grant.)

There is another case which I consider very important. It is that of *Read v. Brookman* (t), where

(o) 2 Shower, 47.

(p) Cowper, 102.

(q) 1. T. R. 399. Cowp. 103. (r) 4 Gw. 1513.

(s) 16 East, 334.

(t) 3 T. R. 151.

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the question was on demurrer, whether a deed might be pleaded as lost and destroyed by time and accident, instead of with a *profert*, which had always been considered indispensable. It was at that time, therefore, thought to be an insuperable difficulty, and the Court gave the question great attention; when seeing how much it would militate against reason and justice, if not allowed, they admitted it on a principle of necessity, contrary to the rule and acknowledged practice. If then, in favour of reason and justice, the rules of the other Courts are made to bend to necessity, why should this Court alone persist in an exemption in favour of tithes, against the common right of the land-owner. That this doctrine of the Court of Exchequer has not given satisfaction in the other Courts of *Westminster Hall*, may be inferred from what was said by Lord *Mansfield*, in the case of *Franklin v. Holmes (u)*, wherein his lordship declared, that he was not satisfied with the doctrine, that a composition real could not be proved by presuming a grant before the 13th *Eliz.*; and, for that reason alone, made the rule for a new trial absolute.

So also in the case of *Rose v. Calland (x)*, the Lord Chancellor *Loughborough* expressed himself dissatisfied with this doctrine of the Court of Exchequer, of non-presumption of grant against a lay impropiator. There remains one other case, which was before this Court in 1743, only four years after

(u) 3 Gw. 1229.

(x) 5 Ves. 186; and 4 Gw. 1622.

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the case of *The Corporation of Bury v. Evans*, and is reported in *Gwillim*, that is *Fanshaw v. More (y)*. It appears that no judgment was then given; and I cite it merely for the strong opinion expressed against this doctrine by Baron *Clarke*. The Lord Chief Baron, indeed, says there, that "A grant is not to be presumed because it is against the canons." What that means I do not know. He adds, "that such doctrine is not inconvenient, for grants of tithes may be preserved by enrolment." But will enrolment preserve them against fire, or from being taken away? He also says, "An Act of Parliament was attempted to remedy this, by Sir *George Heathcote*, about fifteen years before, which miscarried." I hope, if another Act of Parliament should be thought necessary, that it will not again miscarry. Baron *Carter* was of the same opinion, it is said, citing *Benson v. Olive*, which I have already shown has nothing to do with the question; Baron *Reynolds* doubted; but Baron *Clarke* thought it a most important question to be re-considered, and he says, that "though the authorities against such a prescription are very great, yet the reason of them grows weaker every day." That is, as the period of the reformation becomes more distant. He adds, that no care can always preserve grants, and expresses himself altogether dissatisfied with the doctrine, because the reason of the thing is strong against the authorities; and that, 'although authorities ought in general to prevail, for convenience and the security of property, yet, in this particular case, those

(y) 2 Gw. 780.

' objects

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‘ objects would be more promoted by overturning
‘ than pursuing these resolutions, which have been
‘ of real disservice to the clergy, by encouraging
‘ them in bringing bills, on the bare chance of the
‘ defendant’s failing to support his title to exemp-
‘ tion.’ On all these grounds, I am of opinion,
that in this case a grant from the lay impropiator
ought to be presumed.

There is also another objection, for it appears to me, that this is a case wherein the plaintiff’s right is barred by the statute of limitations, 32 *Hen. VIII. c. 2, sec. 7*, whereby impropriations are put on the same footing in the temporal Courts with other inheritances. In 1st *Institutes*, vol. I. lib. 2. c. 12. 159 a. Sir *Edward Coke* says, that ‘ tithes or other ecclesiastical duties, that came to the Crown, by the statute of 27 *Hen. VIII. 31 Hen. VIII, 37 Hen. VIII*, and 1st *Edw. VI*, are by those statutes, and this of 32 *Hen. VIII*, and of 1st and 2d *P. and M.*, in the hands of laymen, temporal inheritances, and shall be accounted assets, and husbands shall be tenants by the courtesies, and wives endowed of them, and shall have other incidents belonging to temporal inheritances.’ They are therefore barred and bound by the statute of limitations, as other tenements or hereditaments are. The words of the Act are, “ where any person entitled to any interest in tithes, &c. shall hereafter fortune to be disseised, deforced, wronged, or otherwise kept, or put from (those words are applicable to retainer,) “ their lawful inheritance, “ estate, seizin, possession, occupation, term, right “ or

“ or interest, of in or to any parcel thereof (that is, any part of the impropriate rectory,) by any other person pretending to have interest or title in or to the same.” Now these tithes are sued for as *parcel* of the impropriate rectory, from which the impropriator has been *kept*, and retainer is possession, within the meaning of the Act, as much as if there had been actual pernancy. Tithes are not casual profits, but annually renewing and increasing; and, if they are withheld, the amount can be ascertained. It is a common thing to buy tithes of the impropriator, to go with the land, and then the land becomes tithe-free, and nothing more is heard of the tithes. I think, therefore, that this is a case to which the statute of limitations applies; and if the plaintiff’s legal right be barred by it, he can have no remedy in Equity.

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These are the observations which have occurred to me on the general doctrine of the case. I will now consider the particular circumstances. Presumption of a grant would not be justified by mere non-payment of tithes; but it is carried further in this case. It appears the prior’s lands were subject to tithes at the dissolution, for this was one of the lesser monasteries. They were afterwards conveyed to Sir *John Packington*, and in that conveyance they were said to be subject to the payment of tithes. He may fairly be said to be at that time impropriator; although it does not appear when he became entitled to the rectory. These lands were afterwards conveyed away, by persons claiming under Sir *John Packington*, to persons under whom the defendant claims;

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claims; and what is there to raise the presumption that the tithes were not conveyed with the land? Then three leases are produced of this inappropriate rectory; and one must suppose, that the lessees would have taken the tithes of these lands if their leases had authorized it, yet there is no evidence that they ever did. In addition to all this, there is in the declaration of Mr. *Cleveland*, who was at one time an impropiator of this rectory, that these lands were tithe-free; meaning clearly, that they were not liable to pay tithes, and not as being merely exempt from belonging to the abbey. Then, in some of the plaintiff's own leases of the tithes of this rectory, he makes an express exception of these lands. This case then does not stand solely on mere non-payment of tithes, and is therefore much stronger than that of *Nagle v. Edwards*, where there was no evidence of the lands claiming exemption ever having been united to the inappropriate rectory, and here we have at least sufficient evidence to presume it. On the ground, therefore, of there being evidence to other points in this particular case, which strengthens the prescription, as well as on the general principles, I think there should be a decree for the defendant, unless the rector asks an issue.

GRAHAM, *Baron*. My mind had been long in suspense on this case, but on very different grounds; and my opinion does not make it necessary for me to disturb the manes of the learned and venerable judges who have formerly sate in this Court. The inclination of my mind is with the decisions which have been pronounced, as I think, with great propriety,

priety, on the cases that have been so often considered by the Court. I shall not go further back than the case of *Bury St. Edmunds v. Evans*, wherein all the former authorities were reviewed. There is a slight, but not very material difference, in the report of that case in *Gwillim* and in *Wood*. The defence set up there was precisely the same as here, and the arguments now used by my brother *Wood*, were then brought forward in support of it. The Court, in that case, held that lay impropiators were on the same footing with ecclesiastical rectors: the statute had given them the same remedy in the Spiritual Courts: and in many cases they sustain the same characters. The Lord Chief Baron *Comyns*, therefore, treats such a plea as hardly deserving notice. And surely no man in his senses would plead *non decimando* beyond living memory in that form, when he might, by showing usage for a number of years, set up thereon a presumed grant; but that cannot be done, for it is in all cases necessary to show some traces of a grant, to support such a presumption. In the case of *Jennings v. Lettis* (z) there was the same plea; and Lord Chief Baron *Parker*, towards the conclusion of his judgment, says, that a grant cannot be presumed unless some deed be produced; meaning that some reason should be given for its non-production, or some traces of its existence shown. But then we are referred to the case of *Fanshew v. Rotheram* (a), as if Lord Keeper *Henley* had differed from Lord Chief Baron *Parker*. That must have been a very different case from the other; and although it does not appear in

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(z) Gw. 952.

(a) Gw. 1177.

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what character, or under what title, the rector sued, the defendant might have been entitled to tithes in pernaney; for the term *possessed* is ambiguous. The Lord Keeper does indeed intimate a doubt, as to the reason of the rule of there being no prescription in *non decimando* against a lay impropiator, but he expressly holds himself bound by the decisions; and the authority of that case is in general against pleas which have the effect of *non decimando*, and is consistent with the law of this Court. And as Lord Keeper *Henley* felt that the doctrine of disallowing the plea of *non decimando* was well established, he must also have perceived the absurdity of admitting it, in substance, under a mere change of form. As to what was said in that case of the necessity of producing the grant on setting up such a defence, this Court does not require that the deed of exemption should be actually produced; but there must be evidence of the former existence of such a deed, and some reason shown, from loss or otherwise, why it cannot be produced.

In the case of *Scott v. Airey (b)*, the distinction was taken between the pernaney of tithes and mere non-payment. So also, in the case of *Orendon v. Skinner*, the tithes never had formed part of the rectory. Those cases, therefore, do not militate with the rule, that the defence of a presumption of grant from the impropiator, cannot be supported by simple non-payment of tithes. It certainly struck me at first, that the plaintiff had stated his title too generally; but that statement is so clearly borne out

(b) 4 Gw. 1174.

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by evidence of perjury, that the defendant is called on for an answer.

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Then what answer has he given? I had originally thought, with my brother *Richards*, that the defence was, that these lands were tithe-free, on the notion that they were privileged lands; but finding that such a defence must be unavailable, the defendant's counsel have taken a different course.

It is not proved when the rectory was granted; but in the 24th *Hen. VIII.* the site of the house of the *Austin Friars*, which was seven acres and a half, the lands now in question, was granted to *Pye* and *Brown*. There is no mention made in that grant of tithes, and they appear to have belonged at that time to an ecclesiastical body, and therefore, could not then have been granted by the Crown. In the 2d of *Edw. VI.* this land was by them conveyed, by the same description, to Sir *John Packington*; but there also, there is no trace of the tithes being granted, although that is the ground on which the presumption is to rest. In the 4th *Edw. VI.* there was some doubt of the validity of the grant, and the grantees were called on, by *scire facias*, to show their title; when these lands were found to have been conveyed to the *Littleton* family; but still nothing is said of tithes. There is not, therefore, any unity of possession proved; and if we were to send this case to a Jury, under these circumstances, on the ground of a presumption of a grant of the tithes, we should, by so doing, strongly prejudice their minds in favour of the defendant. There is

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not a single document or other evidence produced, to show that the tithes were ever considered to belong to the defendant, and it rests entirely on non-payment; and although non-payment might, in some circumstances, be made by evidence to resemble pernaney, in this case nothing like it has been shown; for the supposed disclaimer of the impropiator, and the exception in the leases, amount to nothing, as there are various ways of accounting for such circumstances. I think there is no occasion; therefore, for any further inquiry.

THOMSON, *Chief Baron*. The only question remaining is, as to the tithes of the *Friars* lands; and it is, whether non-payment, supported by the circumstances of this case, is sufficient ground for inferring a grant of the tithes from some former impropiator to some former owner.

Undoubtedly, if such a grant had existed, the defence would not have been a prescription in *non-decimando*; but still the question will be, what is to be considered sufficient evidence of such grant. Mere non-payment would clearly not be such evidence. Retainer alone, amounts to nothing more than *non-decimando*.

The cases which are to be found on this subject ought not, certainly, to be lightly treated; they were decided by very able men; and having often come under the consideration of the Court, they have always been held to be law. Though some Judges elsewhere may have expressed a disapprobation of those cases,
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yet I am not aware of any counter decision ever having been made, and until they are overturned by the highest authority, they must be the law of this and every other Court; for I know of no distinction between the law of one Court in *Westminster Hall* and another, as it regards questions of tithes. The Lord Chancellor would not compel a purchaser to take a title, against the case of *Nagle v. Edwards* (c); and Lord Northington has also adhered to that decision. And, in *Rotheram v. Fanshaw*, it is decidedly settled that there can be no presumption against a lay, more than an ecclesiastical rector. We do not, however, say that it is in all such cases necessary to produce the grant; but it must be shown that such a grant did exist, by other evidence than mere non-payment. It is analogous with the case of composition real (d), where the Court always expect evidence of a deed having existed to be given.

I remember, in a case which was argued when I was at the bar, the Court refused to grant an issue, on the question of whether the long payment of a sum of money, which had been originally stated to have been paid as a modus, was not, in fact, such an usage as was evidence of a composition real, but sent them down on the modus. That was the case of *Smjth v. Goddard*.

Now what is the evidence of usage here, to infer that any such deed ever existed. It is not shown

(c) *Rose v. Calland*, Gw. 1622.

(d) Vide *Chatfield v. Fryer*, ante, Vol. I. 234.

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that Sir *John Packington* ever conveyed the tithes of these lands, or at what precise period he himself had them.

The defendants to the Crown process pleaded a title by conveyance of the land, without one word about the tithes; and the inquiry would certainly have extended to the tithes, if they had had them: for so far from neglecting that object, the Crown called on the defendants, by the same record, to account for their possessing other lands in another county (*Shropshire*,) and for the tithes of those lands also; and if they had had both, therefore, in this case, it is probable that they would have been called on to defend both.

As to the authorities which have been cited where the doctrine of presumption has obtained, I make this observation. In all those cases the defence was an actual enjoyment of tithes, and not a mere retainer. In the case of *The Mayor of Kingston-upon-Hull v. Horner*, although the plaintiffs were not a corporation by prescription, a grant of tolls was presumed. But that was a case, the object of which was to support a claim of right, on the ground of long enjoyment. It is the same thing also in cases of right of way, defending the possession of the thing possessed, and referring, in support of it, to the evidence of long enjoyment. So it was in *Scott v. Airey*, which is distinguishable from all the cases of *non-decimando*, because the defendant was in actual perception of the tithes, and they had been made the subject of family settlements, and had been received in specie. Then in the case of *Oxendon v.*

Skinner

Skinner (e), Lord *Kenyon* (having the abstract of the title, and the opinions which had been given on both sides, before him,) takes the same distinction. It is true, he says, the title cannot be disturbed, "because the portion of tithes had been severed from the rectory ever since the conquest;" but, he adds, "if these tithes had been part of the rectorial tithes, no time would have barred the rector."

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In the case of *Jennings v. Lettis (f)*, which has been alluded to, a very elaborate judgment was delivered. There the land for which the exemption was claimed, and the impropriate rectory, had been once in the same hands; but it was held, that without some evidence of a grant, it could not be allowed to be presumed. The Lord Chief Baron says, "The non-payment of these tithes to the plaintiff, and those under whom he claims, is to raise a presumption in favour of the defendant; and granting by family settlements, and levying fines, and suffering recoveries of them, is to strengthen that presumption. But still the defendant's case rests upon presumption, and will not give his landlord any title to the tithes; and, turn this case in your thoughts as much as you please, it will come to no more than a *non-decimando*;" and so I say here.

As an allusion has been made to an opinion said to be expressed by the Lord Chancellor, in disapprobation of the cases decided in this Court, I will

(e) Gw. 1513.

(f) Gw. 959.

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cite the case of *Berney v. Harvey (g)*, which is probably the latest case on the subject. The defence there was, a retainer of the tithes by the occupiers, for more than sixty years before the death of the plaintiff's predecessor; and that time was probably fixed on in allusion to some statute of limitations. The Lord Chancellor, in his judgment, adopts the universal distinction of actual pernancy and mere retainer, and considers that the latter case is not a subject to be decided by a Court of Law, unless coupled with a colour of title.—(*His Lordship read the judgment reported to have been delivered in that case.*)—The final result of the Lord Chancellor's opinion seems to be, that notwithstanding the doctrine had on some occasions been brought into question, he could not rashly depart from, or disturb it; and therefore decreed the amount of tithes: and so do I, most heartily, on the present occasion. Nor can the decided cases now be departed from, without destroying every thing like certainty in the law of tithes.

Then, with regard to the question on the statute of limitations. I have never before heard of any case wherein that statute was applied as a bar to a bill in this Court, or that it was more applicable in the instance of a lay than an ecclesiastical rector. It is clear to me that the statute 32 *Hen. VIII.* ch. 2, proceeds wholly on the ground of *disseisin*, and does not extend to mere withholding or refusal to pay tithes. The eighth section is quite conclusive on that point. It gives parties, labouring under certain incapacities

(g) 17 Ves. 119.

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to prosecute their rights at the time of passing the Act, the same advantages for six years after the removal of such incapacities, which they might have had before the making of it. Now it is clear that there was at that time no remedy, by suits of such description, as a common law right, for the recovery of tithes, such remedies having been given by the subsequent statutes of the 32 *Hen. VIII.* ch. 7, and 2d and 3d *Edw. VI.* ch. 13 ; but those statutes have nothing to do with suits here. There must therefore be a decree for an account of these tithes, as prayed, with costs.

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RICHARDS, *Baron*, here took occasion to observe, that the opinion said to have been expressed by Lord *Loughborough*, in *Rose v. Calland*, must have been altogether extrajudicial ; for that it was impossible that any such question could legitimately have arisen in that case. There could have been no fair inquiry before the Master whether the land was tithe-free, because the person claiming the tithes was not before the Court, for he was not a party to the record.

1816.

Wednesday,
22d May.Friday,
26th January.

The KING (in aid of HUGHES) v. WILTON.

A debt due to the Crown for duties payable in respect of *post-horses, income tax, stage-coaches, and assessed taxes*, is not a debt of such a nature as will entitle the Crown's debtor to an extent in aid, against his own debtor.

Nor will a Baron (*semble*) if aware of the nature of such a debt, grant a fiat; or, if by inadvertence he should, the Court will set it aside in a subsequent stage, *quia improvide emanavit*, without requiring the defendant to plead.

ABBOTT moved for a rule to show cause why two extents, which had been issued by *Hughes* against the defendant, should not be set aside for irregularity, and that he should pay the costs of the application.

The objection on which the motion was founded was, that under the circumstances which appeared on the face of the affidavits, on which the commissions had issued, the prosecutor was not in a condition to call for the extraordinary aid of the prerogative process; for that none of the debts which he had sworn to be due from him to the Crown, were of that nature which would entitle him to an extent in aid.

Those affidavits were in substance as follows :

The first of them stated, that the deponent (the prosecutor of the extent, describing himself to be an hotel-keeper at *Cheltenham*,) was indebted to the Crown in the sum of 75*l.*; viz. 20*l.* part thereof, for the duties payable by him in respect of post horses, between the 14th *October* then last, and the 4th of the then instant *November*; 25*l.* for the tax payable in respect of property, commonly called the income tax, from *Lady-day* to *Michaelmas* then last; and 30*l.* for duties payable in respect of stage coaches,

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(in aid of
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coaches, from the 19th *June* to the 30th *October* then last. It then stated, that the defendant was indebted to the deponent in the sum of 75*l.* for money lent in *May* then last, and that he (deponent) had received no security or satisfaction therefore, except the bills and acceptances of the said defendant, which were then over-due, and unpaid.

The other affidavit stated, that the defendant was indebted to the Crown in the sum of 52*l.* 13*s.* 4*d.*; viz. 5*l.* 4*s.* for the duties payable by him in respect of post horses, between the 5th and 12th *November* then instant; 13*l.* for certain assessed taxes, payable at *Michaelmas* then last; and 34*l.* 9*s.* 4*d.* for duties payable by him in respect of stage coaches, from 4th *October* to 12th *November*. And that the defendant was indebted to him in 49*l.* for money lent and advanced, and for rent and chaise-hire; with the usual allegations of insolvency, &c. &c.

It was now submitted, that if an extent were to be allowed in such cases as the present, it would always be resorted to, instead of using any other process; for there is scarcely a man in the kingdom who would not be in a condition to obtain the advantage of an extent if this were well founded: but it was insisted, that it never could have been intended by the Legislature to apply it in aid of such debtors.

[WOOD, *Baron*, observed, that if he had been aware of the nature of the debt when the fiat was applied for, he would not have granted it.]

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(in aid of
HUGHES)
v.
WILTON.

Dauncey, rising to show cause, on the 9th February, was stopped by the Court, who ordered it to stand over till the Crown officers had been served with the rule, which was therefore enlarged till the next term.

Tuesday,
7th May.

The Solicitor General now attended on the part of the Crown, and disclaimed any desire, as far as the revenue was concerned, to support the extent in the present instance. He stated, that it was the object of the Crown officers, that the prerogative process should be supported in all cases where it was employed for the benefit of the public service; and that it was equally their object that it should not be abused, by being perverted to private purposes alone. And he submitted, that the Crown, through the medium of this Court, possessed, and might exercise, a controlling power over that process with which the Crown was armed for the protection of the public interest. The statute of 33 Hen. VIII. ch. 39, sec. 55*, has given to this Court a discretionary jurisdiction in the case of process awarded for the recovery of the King's debts. Subsequent to that statute, this Court has been from

* And every such several suit and suits (for any debt or duties growing due in the several offices and courts of the King's Exchequer, &c.) shall be made in every of the said several offices and courts, under the several seals of the said several courts, by *capias*, *extendi facias*, *subpœna*, attachments, and proclamations of allegiance, if need shall require, or any of them, or otherwise, as unto the said several Courts shall be thought by their discretions expedient for the speedy recovery of the King's debts.

time

time to time in the exercise of that discretion so given them, and has established certain rules and orders, for the purpose of regulating the mode of proceeding in such cases, and of checking abuses. The Court therefore may enquire, in all cases, whether the party suing an extent is in a situation to entitle himself to the Crown process; and where he is not, they have power to set it aside. If the sanction of the Crown officers were necessary to an extent in aid, it would certainly not in the present instance have been granted.

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Dauncey, in support of the extent, contended, that it was not in the discretion of the Court to say, that a debtor to the Crown (having put his debt on record,) should not have an extent in aid. According to the argument of the Solicitor General, this is made a most important question; for it goes the length of saying, that a simple contract debtor is in no case entitled to an extent in aid without the sanction of the officers of the Crown. It has always been considered at the bar, and allowed by the bench, that a *bonâ fide* debtor of the Crown has a right to put his debt on record, by means of procuring an extent against himself, and he then becomes entitled of common right, to an extent in aid against his debtor; and there has never been an instance of a Baron refusing, in his discretion, to grant a fiat under such circumstances (*a*).

[GRAHAM, *Baron*. I do not agree to that pro-

(*a*) *Rex v. Blatchford*, Anstr. 165, 166.

position.

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position. A Baron is entitled to exercise a discretion by the express words of the statute, and I think this is the sort of case wherein he ought to use it; for it is at least a novel proceeding for a debtor of the Crown thus to gain an advantage by this proceeding, merely in consequence of his own personal default.]

When the simple contract debt has been once put on record, there is no difference between such a debt and a debt by bond, except as affecting the lands of the debtor; and whatever alteration it may hereafter be thought expedient to make in the law in that respect, by the Legislature, the Court is at present bound by what has always been the constant and uniform practice. It is impossible that the Court should be expected, if they had the power, to discriminate between the various descriptions of simple contract debts, and to say which shall entitle the debtor to the Crown process, and which shall not.

These are traversable proceedings, and whatever can be urged against them may and ought to be pleaded; but the present attempt is to set aside the extent altogether, on motion, on the ground that a sufficient debt is not owing by the prosecutor to the Crown, which can only be ascertained by the result of a traverse.

It has been said, that the sanction of the law officers of the Crown should be in all cases necessary to the issuing of an extent; but, however that may

may be matter of consideration in future times, it is certainly not at present necessary, although it has been sometimes recommended by the Court.

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WILTON.

Peake, in support of the rule, submitted, that the defendant had been advised to seek the present object by motion, to avoid the ruinous expense which must necessarily attend the more formal course of pleading to the extent; for the Crown being the party, though only nominally, the defendant would not be entitled to costs; and that is a strong reason why the Court should be cautious of issuing such extents in the first instance.

This is obviously a mere experiment. An extent has never before been issued under such circumstances, and for such debts; and that alone is a signal proof, that it is by the course of the Court impracticable.

The statute of 33 *Hen. VIII.* is confined to specialties and debts of record.

[*GRAHAM, Baron.* The Court have always construed that statute as comprehending simple contract debts.]

Then a material distinction arises between such debts as are due to the Crown from persons especially entrusted by the Crown in some official character, or otherwise where confidence is reposed, (as in the case of those who become debtors to the King by having possession of money due to the Crown from

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from third persons,) and such debts as are due from private subjects who have no intercourse with the Crown, nor are entrusted in any other way than by being suffered to become so indebted on their own account. The former ought, for the protection of himself and the public, to have the privilege of making himself a debtor on record, for the purpose of obtaining an extent in aid ; the latter ought not, unless the officers of the Crown had first proceeded against them, and then only because it would be really an extent by and for the benefit of the Crown.

The Solicitor General, in reply, insisted, that this process being one which was exclusively instituted for the benefit of the Crown, and was sued out at the suit of the King, and in the name of the King, the officers of the Crown ought to be invested with a control over it in any stage of the proceeding, and might abandon the prosecution of the suit at any time, as they might a public indictment or information, which cannot be proceeded in after a *nolle prosequi* by the Attorney General, even though it should be corruptly obtained.

The proceedings in the present instance, if well founded, would create a perfect anomaly in the law, establishing that any one who should be, by any means, indebted to the Crown, in however small a sum, might procure an extent to be issued against himself, which would entitle him to an extent in aid, and give him a priority as to all the other creditors of his debtor ; and, it is said, he would be entitled to that advantage of common right,

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(in aid of
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right, and independently of the Crown or the Crown officers. The case of the *King v. Blatchford*, which has been cited, does not decide any thing which would go to establish such a doctrine; and there may have been many particular circumstances in that case which might have influenced the decision, even as far as it goes, of which we are not informed by the report. That case, however, is also an authority to show that the Court exercises a control in matters of extent, as it notices that rules had been made with regard to the issuing the process, without observing which, it could not have been granted. The foundation of all the rules which were made in *Hilary* Term 15 *Ch. I.* was expressly to prevent the abuses which had become prevalent. Such restraints, therefore, having been from time to time put on this process, in the hands of Crown debtors, sufficiently proves that the right to use it is not a common right of the subject. Those rules were followed by one in *Michaelmas* Term, 3d *William* and *Mary*, whereby the Court ordered, that no extent should issue on bonds to the Crown, before one of the Barons of the Court should have been attended with the bond*. Such a rule has the effect of precluding the party to the bond from suing out an extent, without the consent of the officer of the revenue department, in whose custody the bond is kept.

The Crown, therefore, through the medium of this Court, has a power of withholding the extent,

* *Vide Rex v. Sly*, ante, p. 164.

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and of saying in what particular cases only, it shall be issued, and the subject has not the indefeasible right which it has been urged that he has, of using the Crown process without the consent of the Crown, and even against the interest of the Crown. If the subject really had such a right, he might, by electing to proceed against himself by extent, often deprive the Crown, (which cannot have two remedies at once,) of a more summary course. For instance, in the case of taxes, the act gives the collector a speedy method of proceeding by distress; but if an extent has been issued, that remedy is thereby defeated. The right, therefore, must be taken to exist, with this qualification, that the Crown consents to let its debtor use its process, or at least that it does not dissent.

The doctrine of a common general right being thus disposed of, the next question is, as to the species of debt which must be due from the party prosecuting the extent, to entitle him to the process. It is not every *bonâ fide* simple contract debtor to the Crown who is entitled to it. The substance of the argument on this part of the case was, that the debt must be such a one as bespeaks a trust on the part of the Crown, and a responsibility on the part of the debtor; whereas here there is no such thing. It is a mere common debt, for common taxes, for the recovery of which a peculiar mode of proceeding is pointed out by the statute, which the debtor ought not to be permitted to supersede by causing an extent to issue against himself.

Cur. adv. vult.

THOMSON,

THOMSON, *Chief Baron*, having recapitulated the material points of the case, and stated the objections which had been taken to this extent, now gave judgment as follows :

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(in aid of
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v.
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We can find no instance of an extent having ever been issued, founded on debts of such a nature as those on which this writ has been obtained, after a diligent search having been made in the office by our direction, for precedents ; and the prodigious inconvenience which would follow, from permitting this process to be issued by persons indebted to the Crown in the way in which this person is, so as to give such debtors to the Crown an undue preference, inclines us to be of opinion, that the present case is not one in which we ought to permit the Crown process to be used.

This is not the case of a person indebted to the Crown under circumstances which form the usual foundation of extents in aid ; but the only ground in this instance, is an ordinary debt due to the Crown, of small amount, arising from certain current duties being unpaid. So that, if this were permitted, almost any person whatever who should be in any manner indebted to the Crown, (as almost every individual is at all times, for taxes of some description,) and that to the smallest amount, would be entitled to the benefit of this extraordinary proceeding ; and in cases of insolvency would gain a priority over the other creditors of the debtor, for any debt, however large, though their own debt to the Crown should not exceed four or five pounds.

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To give an instance of an extreme case, every beneficed clergyman would be entitled to this process at any time against his debtor, because the beneficed clergy are at all times of the year indebted to the Crown, in respect of their tenths, though not amounting perhaps to more than forty shillings a year in the whole. Such a doctrine could not but be pregnant with the most mischievous consequences.

It was urged, that the ground of this motion is properly the subject-matter of plea, and not of a summary application to set aside the extent; but I cannot see how it could be pleaded, because the debt on which the extent is founded could not be traversed by the defendant, as no doubt *Hughes* was indebted to the Crown at the time of issuing the extent, in the manner stated in the affidavit.

The question now before the Court is, whether, being so indebted, the prosecutor had thereby become entitled to sue out an extent for the purpose of recovering his own debt from the defendant. We are clearly of opinion that he was not so entitled; and therefore we think, that this extent should be superseded, *quia improvide emanavit*.

Rule made absolute.

Ex parte

Ex parte HIPPLESLEY.

1816.

Wednesday,
22d May.

DAUNCEY applied to the Court for a writ of *diem clausit extremum*, on a special affidavit framed to meet the particular circumstances of the applicant's case. *Sheppard* was indebted at the time of his death to *Hippesley*, upon simple contract; and administration having been granted to another creditor of *Sheppard's* in the same degree, that creditor had thereby obtained the advantage of an administrator's privilege of retainer. *Hippesley* then filed a bill for relief by means of the interposition of a Court of Equity; but having been afterwards advised that he might have sued an extent, (*diem clausit extremum*,) by reason of his having given a bond to the Crown as a maltster, he abandoned his suit in Equity for the sake of that object.

The allegation, required to be made in the affidavit to found an extent in aid, "that the debt has not been sued for in any other Court," cannot be dispensed with; nor can the Crown's accountant be permitted to abandon another mode of proceeding, previously elected by him for the recovery of his debt, for the purpose of enabling him to make that allegation.

The difficulty then arose on the practicability of his making the usual affidavit, with the necessary allegation, that the debt *had not been* sued for in any other Court; and in consequence of that difficulty, the present motion was made in open Court, on an affidavit detailing all the facts at length, in addition to the usual statements, with an allegation, that the suit which had been commenced in the Court of Equity had been since abandoned: when

The Crown's debtor cannot have a *diem clausit extremum* in aid after the death of his debtor, against the estate, unless the debt have been found in the life-time of the deceased.

The Court held, that the applicant could not
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1816.

Ex parte
HIPPLESLEY.

be permitted, after having made his election to proceed in another manner, to abandon that proceeding for the purpose of the present object, and that the allegation could not be dispensed with, or even so modified as was now proposed.

THOMSON, *Chief Baron*. It is quite impossible that we can grant this application.

There is another ground of objection; a *diem clausit extremum* may certainly issue at the instance of the *Crown*, against the estate of its debtor in a proper case, but never *in aid*, unless the debt has been found in the life-time of the debtor. The case in *Parker (a)* is decisive on that point*.

Motion refused.

(a) *Rex v. The Estate of Henry Boon, deceased*, p. 19.

* There arises, perhaps, another objection to the application, from the necessity of the allegation of some *act* of insolvency, which would be often difficult *after* the debtor's decease.

The

The ATTORNEY GENERAL v. POUGETT.
(Demurrer.)

1816.

Wednesday,
22d May.

SCIRE FACIAS, tested 12th November, (54th of the King) on bond to the Crown dated 4th May, 53 Geo. III, for 1,090*l.*, reciting an order of the Treasury of the 1st May 1813, permitting certain vessels to depart with hides shipped previous to the passing of the Act of Parliament of the 15th April then last, imposing new duties on hides, upon security being given for the payment of the said duties, if the said hides, so shipped as aforesaid, were liable thereto; and that the defendant had shipped on board one of such vessels (the *Henrietta Nicholls*,) for *Ostend*, 4,540 hides, weighing 130,544 pounds: conditioned that the defendant or his surety should, on demand, pay to the collector inwards of the customs at the port of *London*, all and every the duties of customs so imposed by the said Act of Parliament, if liable thereto.

Plea, that the said hides, so shipped, &c. for exportation, were not, nor were any of them liable to the duties imposed by the said Act, as in the said condition mentioned.

Replication, *precludi non*, because the defendant, before the making of the said writing obligatory, and before the suing out of the said writ of *scire facias*, shipped and put on board the said vessel, to

by omission in a former statute of the same session, has relation back to the time when the first Act was passed.

Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the same nature, although she is not only freighted and afloat, but has gone through all the formalities of clearing, &c. at the custom-house, and has paid the exportation duties. And all such new imposts as are laid on such goods attach while the vessel is water-borne within any part of the port.

An Act of Parliament made to correct an error

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be exported to *Ostend*, beyond the seas, (the same being a place under the dominion of the person exercising the power of sovereignty in *France*,) divers large quantities, to wit, 4,540 foreign hides in the hair, not tanned, tawed, curried, or otherwise dressed, weighing 130,544 pounds, to wit, on the 25th March 1813, at, &c.; and that the same hides then and there continued so shipped on board the same vessel, in the same port, and not exported from and out of this kingdom, until after the passing of the said Act of Parliament in the said condition mentioned; and that the same hides were before the suing out of the said writ of *scire facias*, to wit, on the 6th May 1813, at, &c. exported from and out of this kingdom in the said vessel.—And that, by virtue of the said Act of Parliament, in the said condition mentioned, and of another Act of Parliament of the 53d Geo. III. made and passed, amongst other things, to explain and amend the said last mentioned Act, the same goods became liable to the payment of certain duties of customs to the amount of 545*l.*; and that some were then and still are wholly unpaid.

Rejoinder,—That although the said hides in the said condition and replication mentioned, were shipped and put on board the said vessel, in the said port of *London*, to be transported to *Ostend*, and so continued, &c. until after the passing of the said Act; and although, before the issuing of the said writ, said vessel departed with said hides to *Ostend*, yet the said hides, and every of them, were so shipped and put on board the said vessel long before
the

the passing of either of the said Acts of Parliament. in the said replication mentioned;—and that long before the passing of either of the said Acts, to wit, on the 22d *March* 1813, the said vessel was duly entered outwards for *Ostend* aforesaid, at the custom-house.—And that, before the passing, &c. to wit, on 25th *March* 1813, the said hides were duly entered and cleared at the custom-house as goods to be shipped on board the said vessel, and to be duly exported as aforesaid. And the said defendant further saith, that according to the rule established in collecting the duties of customs, the duties payable upon goods exported are levied and paid at the time of the entry of such goods outwards, at the custom-house of the place where such entry is made. And that, on the making the said entry, and before the passing of either of the said Acts of Parliament, he duly executed the usual bond for the due exportation of the said goods, and that the same should not be re-landed in this country. And that the said hides, after they had been so entered, were shipped for the purpose aforesaid, and were not afterwards re-landed, but remained on board for the purpose of being transported to *Ostend*, according to the entry thereof, until the said vessel afterwards, and after the said treasury order, departed from this kingdom to *Ostend*. Therefore defendant saith, that the said hides were not liable to the duties imposed by the said Act of Parliament.

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Demurrer to the rejoinder, and joinder in demurrer.

Roe

ATT. GEN.
T. POLGRIFF.

1815.
Tuesday 21 Nov.

Ros was heard in support of the demurrer, and *Copley*, Serjeant, for the rejoinder, when the Court ordered a second argument;

1816.
18th May.

In which *Walton* argued for the demurrer, and *Best*, Serjeant, *contra*.

The counsel for the Crown contended, that what was alleged by the rejoinder to have been done, did not amount to an exportation of the hides; and that therefore they were subject to the new duties imposed on the goods, while the vessel was in the port, by the 53 Geo. III. ch. 33*, that

The question whether the hides so shipped are to be considered liable to the additional duty, would depend entirely on the construction which the Court should give to the word "exported," as used in the statute. In common parlance, it means carrying out of port; and by the use of the word in various other acts, that must be also its legal sense and legislative construction. Thus the 32d

* By sec. 1, it is enacted, that from and after the passing of the Act, there shall be raised, &c. upon goods, wares, and merchandize exported from *Great Britain*, the several new and additional duties of customs set forth in a schedule referred to. That schedule was defective, the quantity of raw hides, for which the duty was meant to have been payable, being omitted to be expressed. The words in the schedule are, "Hides, foreign, of all sorts, in the hair, not tanned, &c. exported to France, &c. the sum of 9s. 4d." To rectify that mistake, by chap. 105, (after reciting the error) it is enacted, that the said sum of 9s. 4d. shall be chargeable (as was intended) on every hundred weight of such hides.

Geo.

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*Geo. III. ch. 43, sec. 2, takes a distinction between shipping for exportation and exporting, by the different sense in which it employs the words when (adverting to persons beginning to ship sugar, when under the price at which the drawbacks were to cease to be allowed on exportation,) it permits them to export and receive the drawbacks on such sugar, although it might have risen in price to the sum at which such drawback was to cease to be allowed on the exportation thereof, after such persons shall have begun to ship the same, and before the exportation thereof. And the same distinction is taken in several other statutes, as the 23d Geo. III. ch. 21, which gives a bounty on the exportation of calicoes; and the 41st Geo. III. ch. 44, which enacts, that the drawback and bounties payable on the exportation of sugar, shall be paid on all such sugar as shall have been, or shall be shipped or laden on board any ship, or water-borne, with intent so to be shipped for exportation, making the acts completely distinct. The same difference obtains in the meaning of the words importation and entry, in the 53 Geo. III. c. 33, sec. 2. The case in *Bunbury* (a), of *Leaper v. Smith*, was cited to show that there could be no legal importation until the ship arrives within the limits of the port; and, by parity of reason, there can be no exportation until without the limits. *Sir Thomas Cooke v. The Attorney General* (b), was also cited, where it was resolved, that goods being shipped on board for exportation, without going out of port, was not an exportation.*

(a) Bunb. p. 79.

(b) Parker, 266.

And

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And the recent case of *Williams v. Marshall*, in the Court of Common Pleas (*c*), was much relied on, where the question was, whether a vessel's license ceased to afford her protection: and it depended on whether she had exported her cargo by the 10th September. She had cleared at the custom-house on the 9th, but was at *Gravesend* on the 12th; and (it being a fair case) *Gibbs*, Chief Justice, reluctantly held himself bound, by the rules of law, to say that that was not an exportation.

As to the point of the retrospective operation of the Act, the case of *Latless v. Holmes* (*d*) was relied on, where *bonâ fide* annuity deeds were set aside, because not enrolled according to the exigence of an Act of Parliament, which had not received the royal assent till four months after the execution of those deeds; and the leading case on the point of the time from whence Acts of Parliament are to take effect, of the *Attorney General v. Panter* (*e*), cited on that occasion, in which the House of Lords held (affirming the decree of the Court of Exchequer), that a duty imposed by an Act of Parliament on the exportation of rice, attached on rice which had been exported before the Act had received the royal assent.

On the other hand it was argued, that the term exportation, was one which, in cases of this sort, ought to be considered, with regard to the subject-matter, and the object of the statute, as a revenue

(*c*) 2 Marsh's Rep. 92.

(*d*) 4 T. R. 660.

(*e*) 6 Br. P. C. 486.

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law, rather than according to any popular acceptance of the word; and that the statutes relating to the revenue should be construed to give effect to their policy and intent, with a view to the purpose for which they were made.—That according to the practice of the custom-house it must be taken, that for the purposes of the intention of the Legislature, when the duties have been paid, the hides shipped on board, and the entry outwards and clearance have been completed, the goods must be considered as exported, at least as far as the merchant is bound, for he has done all he could; and if, afterwards, he should be detained in the river by any inevitable accident, he would be free from blame, and ought to be free from evil consequences.—That it would otherwise be a most embarrassing and ruinous thing to merchants, who speculate in trade, and of course are guided in their calculations by the known amount of the duties on exportation at the time of their making a shipment, if before the vessel should get out of the river, or be actually beyond the limits of the port, they would become liable to new duties imposed in the mean time, by which their venture might be defeated and themselves ruined: for, having once shipped his goods, the merchant cannot re-land them without incurring a forfeiture of his bond, so that his case is most hard.—And that as a merchant who had so shipped goods for exportation, would not be allowed a bounty given by a subsequent Act on all such exportations, he ought not to be liable to a subsequent duty.

To

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To support the first proposition, that Courts have a discretion in construing statutes, the following *dictum* from *Hobart* (*f*) was cited; where it was said, (the inquiry being by what rule judges were guided in a diverse exposition of the same word and sentence,) "It is by that liberty and authority that judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use."

As an authority that exportation need not be completed by passing the limits of the port, the case of custom in *Coke's Rep.* (*g*) was cited, which was this; a merchant who had brought Bay salt to a haven in *England*, sold a part, and discharged them to another ship, in which they were transported again, without having been put on shore, but having been always water-borne; and it was held, that that was an importation, and subjected the goods to pay custom. In that case, too, alluding to the words of the statute 1 *Eliz. ch. 11*, concerning *exportation*, the meaning of that word is given in the *viz.* as being "sent from the wharf, key, or other place on the land." If, as was held there, the discharging goods out of the ship, is a putting them upon the land, is not the loading goods on board, to be construed to be a carrying out of the port?

A manuscript note of a case, on which Sir *William Scott* had given judgment, was also cited, in answer to that from *Marshall*;—the case of the *Mars*,

(*f*) *Sheffield v. Ratcliffe*, p. 346.(*g*) 12 Rep. 18.

Captain

Captain *Blower*, in 1815;—where (it was said,) that although the license to export expired on the 8th May 1814, and although the ship did not sail till the 9th, and was captured on the 17th, Sir *William Scott* thought that she was still within the protection of the license, and restored her.

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[THOMSON, *Chief Baron*, having intimated that there must have been some very particular grounds for that judgment, the counsel professed themselves unable to furnish any more of the case than the mere result.]

To distinguish the case before the Court from those cited for the Crown, it was argued, that the case in *Parker*, of Sir *Thomas Cooke v. The Attorney General*, did not apply; because there, after the goods had been shipped on board, for exportation by a certain time, they were endorsed to another ship, and that while in the port; and therefore the drawback was lost, because they were not carried out by the ship *within the time*. There is a difference too, whether the goods are exported in a *British* or foreign ship; and they might have been endorsed to the latter in that case. The case of *Williams v. Marshall* also was said not to apply to the present, because they were *diverso intuitu*. That was a question on a license, in which the time of sailing from the port is most material, and of the essence of the thing; whereas in matters relating to the customs, the sailing out of port is of no importance, provided the duties be paid, and the cargo be shipped and not re-landed. There is no time mentioned in the bond

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bond for the departure of the vessel, and, for every purpose of the revenue, she has departed and exported, as soon as she has received her cargo on board and gone through all the formalities, paid the duties, and obtained the custom-house cocquet. The difference is, that as far as the underwriters are concerned, the word exporting, according to the terms of the license, means leaving the port and commencing the voyage. But where the revenue is interested, exportation means nothing more than taking the goods on board, not to be again re-landed, and satisfying the customs; and there lies the distinction between this case and that of licenses, with which clearing from the customs has nothing to do.

The objection was then taken on the question whether these goods were affected by the second Act. The first Act passed on the 15th *April* (53d of the King) and the second, on the 10th *July* following; and the goods were exported, in the mean time, according to either sense of the word. It was therefore contended, that as when the last Act passed, the goods were unquestionably exported, and as the first derived all its efficacy and power from that, (for without it, it would have been wholly nugatory and inoperative,) no duties were in fact imposed till after these goods had been actually exported, and therefore none were payable at all, or at most only 9s. 6d. on the whole cargo. And on that point, the case of *Gilmore v. Shuter* (h) was cited; where it was determined

(h) 2 Lev. 227.

that

that a promise within the statute of frauds was binding, where made before that statute, though not sued on till long after it.

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In reply, it was contended, that the case from *Coke* did not press on the Crown in this instance, because the question there was, whether goods brought into the port were liable to the duties payable on landing them; and it was determined, that what had been done there was tantamount to laying them on land. And it was insisted that the cases from *Parker*, and *Marshall*, bore the Crown out in its construction of this statute, that shipment is not exportation;—that there could not be an exportation for one purpose, and not for another;—that the present case was not one of greater hardship than what happened constantly to wine merchants to whom it was not convenient to take away their stock, which continues liable to all the new duties;—that the *dictum* from *Hobart* was *there* used in *favour* of the Crown;—and that the Admiralty case was quite inconclusive, and furnished no answer to that of *Williams v. Marshall*: and perhaps a Court of Law might determine a question of validity of license differently from the Admiralty Court, even under the same circumstances.

To the objections arising on the subsequent Act, it was replied, that the amendment supplied by it had become incorporated with the first, and would relate back to the time when that imperfect statute had been first passed.

THOMSON, *Chief Baron*. This may be a question,

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tion, certainly, of considerable importance to the defendant, as far as the value of the goods and the amount of the duty extend; but there seems to be no great difficulty in the point which the Court are called on to decide; for that amounts to no more than whether what has been done by the defendant, before the Acts passed, can be considered an exportation of the goods, on which those Acts would have imposed an additional duty if they were not exported. That is the short question. Whatever might be the meaning of the word in common parlance, the Legislature has constantly made a distinction between the acts of shipping goods on board, and actually exporting them.—(*His Lordship noticed the several Statutes wherein those acts have been distinguished, which are adverted to in the course of the argument.*)

The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former Statute as soon as it passed, and they must be taken together as if they were one and the same Act; and the first must be read as containing in itself, in words, the amendment supplied by the last. Then it appears that these goods were shipped on board before the passing of the first Act, but they were not actually exported till after it had passed; and therefore the new duties clearly attached on these goods. And however hard the case may be, it is not more so than the case of *The Attorney*
General

General v. Panter, which, notwithstanding its hardship, is certainly good law.

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There must, therefore, be judgment for the Crown.

GRAHAM, *Baron*. I was at first somewhat struck with the argument of the hardship of this case; but the Court must not be blinded by the hardship of particular instances.—(*His Lordship then recapitulated the circumstances, and stated the question.*)—Whether the *ad valorem* duties were payable or not, the defendant was at all events liable to the payment of the duty of 9s. 4d. on the whole cargo, on the passing of the first Act; and if he were not, the hardship would then be on the other side.

I am clearly of opinion, that what has been pleaded in the rejoinder did not amount to an exportation, according to the accepted meaning of the term, or the sense in which it has been constantly employed by the Legislature; and we cannot adopt a more liberal construction in favour of the defendant.

We are much relieved by the decision in the Court of Common Pleas; and I do not think that the imperfect note of the case before Sir *William Scott*, which was at best a much less solemn decision, is much opposed to it, for nothing appears in that note to enable us to see on what grounds the judgment was pronounced.

WOOD, *Baron*. This is a very short point, and I think, not a difficult one. The question is, whether

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ther the goods laden on board this ship, having broken ground in the *Thames*, and not having left the port of *London*, may be said to have been exported. I am of opinion, that the goods shipped could not be considered as exported until the ship had cleared the limits of the ports. The mistake of the former Act being corrected by the Act which was afterwards passed for that purpose, had relation back to the time when the duties were originally imposed; and therefore, as there was no exportation of the goods, they are liable to the whole of the duties.

RICHARDS, *Baron*. Of the same opinion.

Judgment for the Crown.

1816.

Wednesday,
22d May.

REX v. HOLLIER.

(On an Extent in aid.)

The Court will not interfere to assist a purchaser for valuable consideration, of an estate

OWEN applied to the Court for an *amercias manus*, on the behalf of the purchaser of an estate seized under this extent, under the following circumstances:

seized under an extent against the vendor, for which he has paid the principal part of the purchase-money, and offers to pay the remainder to the Crown, or to give up the estate, on satisfaction made to himself.

Such things are matter of arrangement, and can only be effected by the consent of the Crown.

The

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The present extent had issued against the defendant for a debt of 10,000*l.* on two bonds to the Crown, dated respectively in *August* 1813, and *July* 1814. Two years and a half before the defendant entered into the first of those bonds, he sold the estate to *Moggridge*, on whose behalf the present application was made, for a sum of money, which was to have been paid by three several payments; the last of which (4,000*l.*) was payable by that agreement before the date of the first bond, on the 12th *February* 1812, when *Moggridge* was let into possession; but a satisfactory title not having been made, the conveyance was not completed when the extent issued. *Moggridge*, in the mean time, having laid out a considerable sum of money in improving the property, now applied that he might be permitted to pay the remainder of the purchase money to the Crown, or that he might be permitted to give up his claim to the estate, on satisfaction being made to him. The Crown, it was stated, had also seized other property of the defendant's, to the amount of more than 6,000*l.*

The Court said, that they could not make any order in such a case, for that it was a matter of arrangement with the Crown; and they asked, why the applicant did not plead. To which

It was answered, that he was precluded by his want of legal title.

Per Curiam.—The object of this motion can only be effected by the consent of the Crown.

Rule refused.

The

1816.

Friday,
24th May.The KING (in aid of Cox) v. GLENNY and another,
Assignees, &c.

The Court, on motion for an *amoveas manus*, where the sheriff had seized debts due to the bankrupt at the *teste* of the writ, and paid to his assignees under a commission of bankruptcy, issued after the writ of extent, and before the taking of the inquisition, intimated that that was not regularly a subject for summary interference, but ought to be put on the record.

OWEN had obtained a rule to show cause why there should not be an *amoveas manus* issued, as to certain debts seized under this extent, enumerated in schedule C. annexed to the inquisition.

The affidavit on which he moved it, stated, that a docquet was struck on the 1st *March*; that a commission of bankrupt issued thereon, which was opened on the 18th, on which day a provisional assignment was executed; on the 30th the defendants were chosen assignees, and the assignment was executed to them of the bankrupt's effects. That the writ of extent issued the 4th *March*, but that the inquisition was not taken thereon till the 29th *April*; and that after the issuing of the extent, and before the taking of the inquisition, the debts returned in schedule C. as due on the 4th *March*, were paid to one of the assignees.

On these facts, and the authorities of the case of *The Attorney General v. Sir John Elwall* (a), the result of which is, that debts are not bound till the *teste* of the inquisition, and the case of *Rex v. Green* (b), which establishes that debts, are not bound by the *teste* of the extent, but the caption of the inquisition, the rule was granted.

(a) Bunb. 199.

(b) Ib. 265.

Fonblanque, and *Dauncey*, now showed cause; taking a distinction in the present instance from the cases in *Bunbury*, which were both cases wherein the debtor himself was before the Court, whereas the present application is made on behalf of the assignees of a bankrupt. When the extent issued the bankrupt's books were not to be found; there had been a fraud practised in concealing those books, whereby the inquisition had been delayed, of which they ought not to be permitted to take advantage.

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Owen, in reply, denied that the books had been fraudulently concealed, and relied on the cases cited, when

The Court intimated an opinion, that the subject-matter of the application ought to be put on the record; and that it ought to be pleaded, that at the time of the taking of the inquisition the debts were not due; and that they could not interfere in the present stage of the proceedings.

Ordered to stand over.

(This extent was afterwards compromised between the parties.)

The

1816.

Monday,
27th May.

A brewer indebted to the Crown for excise duties, entitled to an extent in aid.

Quere, Whether the affidavit should not state some act from whence the fact of the defendant's insolvency might be made appear.

The KING (in aid of HORN) *v.* RIPPON and another.

WEST moved for a rule to show cause why this extent should not be set aside, on the ground of the debt on which it was founded not being a debt of such a nature as entitled the prosecutor to the aid of the writ, according to the decision of the Court in the case of the *King v. Wilton (a)*. The prosecutor in this case being a common brewer, and indebted to the Crown for excise duties; but

The Court over-ruled that objection instantly, as the debt in that case was of a very different nature from the present, which is due for duties of excise.

He then objected that the affidavit was bad, because it stated the insolvency in too vague a manner*; the constant and indispensable practice being to allege some fact from which the insolvency is inferred.

The Court granted the rule, expressly confining it to the latter point only; but it was afterwards discharged on another ground.

(a) Ante p. 368.

* The affidavit merely stated, that the defendants were, as deponent had heard and believed, insolvent, and unable to pay the debt.

END OF EASTER TERM.

IN THE HOUSE OF LORDS.

THOMAS BULLEN - - - - - Appellant.

The Rev. JAMES MICHEL, Clerk - Respondent.

1816.

6 C 1174 289 1072 Ca 760 72 B 492
 THE respondent, (as vicar of the vicarage of *Sturminster Newton*, in the county of *Dorset*,) in *Michaelmas* Term 1804, filed his bill in the Court of Exchequer against the appellant, and *Charles Rabbetts*, *Thomas Dashwood*, *James Atchison*, and one *Thomas Williams* since deceased, an issue to be tried, except in the cases of a bill by a heir at law and a rector. The direction of an issue by the Court of Equity is in its discretion, and its object being solely to institute further inquiry, merely for the better information of the Court itself, the order for the trial of an issue is *ex mero motu*.

June 10, 12, 13.

A Court of Equity may decide conclusively in the first instance, on all causes brought to a hearing, without directing

So, also, it is equally in the *discretion* of a Court of Equity to grant or refuse a *new* trial of an issue directed to be tried at Law ; for the issue having been originally directed merely to satisfy the conscience of the Court on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at Law, and it will send the issue down as often as the result is not satisfactory ; or, if satisfied that the finding of the Jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called) had been received below.—*Wood, Baron, dissentiente.*

Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, (whether perfect or not) are good evidence (*quantum valeant*) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognizance of the matters to which it relates.—*Wood, Baron, dissentiente.*

Such a book held to have been found in the proper custody to make it evidence, where it is in the possession of an owner who is so far connected with the abbey as to be possessed of some part of the former estates of the monastery ; although no part of such estate be situated in the parish in which the question between the parties to the suit arises.

The objection of *res inter alios acta* not applicable to such entries and book, when offered to furnish a counter presumption, in order to rebut a presumption raised by the other side.

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as occupiers of lands within the said vicarage, for an account and payment of the single value of the tithes of all the titheable matters and things (except corn, grain, and wood,) had and taken by the appellant and the other defendants in the bill mentioned, since the 21st day of *December* 1802; which tithes the respondent, in his said bill, claimed to be entitled to by endowment or prescription or other lawful ways and means.

The appellant, together with the said other defendants, appeared and put in their separate answers; and thereby insisted, *inter alia*, that as to a certain farm and lands called *Bagber* Farm, consisting of 146 acres, the greatest part whereof was in the occupation of the appellant, a certain modus or ancient customary payment of 5*l.* 3*s.* 4*d.* was due, and had been payable by the occupiers or occupier of the said farm to the vicar of the said vicarage for the time being, in lieu and full discharge of the tithe in kind of hay and grass seeds, and of all other titheable matters and things (except corn and grain) yearly arising, growing, renewing, and increasing upon and throughout the said farm and lands.

The respondent having replied to the answers of the appellant and the other defendants, the cause came on to be heard; and on the 5th day of *May* 1810, it was ordered, that it should be referred to a trial at Law upon nineteen several issues, to try the several moduses; the sixth of which said issues, so ordered to be tried, was as follows; viz. Whether, from time immemorial, the occupiers or occupier of the farm and lands called *Bagber* Farm have or hath paid

paid, and have or hath been accustomed to pay, and ought of right now to pay, to the vicar of the parish of *Sturminster Newton*, on *St. Thomas's Day* in each and every year, a certain modus or ancient customary yearly payment of 5*l.* 3*s.* 4*d.* for, in lieu, and full satisfaction and discharge of the tithe of hay and grass seeds, and of all other titheable matters and things (except corn and grain,) yearly arising, growing, and renewing upon and throughout the said farm and lands called *Bagber Farm*. The appellant to be plaintiff, and the respondent defendant at law.

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The cause was afterwards re-heard (22d *January* 1812,) on petition, as to that part of the decree which directed the issues, at the instance of the respondent (who contended, that on the evidence then before the Court, there ought to have been a decree for tithe in kind;) when the Court affirmed the decree.

At the Summer Assizes for the county of *Dorset*, in the year 1812, the above issue (the sixth) being selected by the plaintiff at Law, was tried before Mr. Justice *Chambre*, and a special jury; when a verdict was found for the appellant.

Upon the trial of that issue, *Thomas Bullen*, the appellant, proved by the testimony of some old persons, that no tithes in kind had, within their recollection, been ever rendered for *Bagber Farm*; but that certain money-payments had been, during that period, annually made to the vicar on *St. Thomas's Day*, throughout the parish, in lieu of the vicarial tithes. Several receipts, given by Mr. *St. Lo*

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and his successors for this payment, (from 1754 to 1791,) were also produced; in which receipts it was sometimes acknowledged as “for rates, or rates for tithes,” and in others, it was stated to be made “for the tithe of *Bagber* Farm.” It appeared, moreover, upon the cross-examination of the appellant’s witnesses, that a notice had been annually given in the parish church some days previous to the 21st *December*, that the parishioners were on that day to pay their tithes; and that the payment for *Bagber*, as well as the other payments throughout the parish, were on that day collected from one and the same paper, called, “The Rate Paper.”

The respondent produced and proved several documents*, to show the value of the vicarage at different periods, for the purpose of raising a presumption of the improbability of so large a proportion in value of the amount of the tithe of the whole district, having been *immemorially* paid for *Bagber* Farm alone. From some of those it appeared, that the value of the whole vicarage, including the glebe and other profits, in the year 1291, was only 10*l.*; and that in 1535, the vicarial tithes alone were worth 8*l.* 16*s.* 3¼*d.* He also showed, by those documents, the value of land in this parish at several other periods; whereby it appeared, that in the 37th *Edw. III.* (*anno. dom.* 1363) 195 acres of land in *East Bagber*, (being that part of the parish wherein the appellant’s lands are situate,) were worth 42*s.* 2*d.* by the year, being about 2¼*d.* per acre;

* The taxation of Pope *Nicholas*;—an inquisition on a writ of *ad quod damnum*;—and the Ecclesiastical Survey of 16th *Hen. VIII.* Vide Appendix.

and

and that in the year 1474, sixty acres of land, and ten acres of meadow in *Bagber*, were found to be worth in all issues, besides reprises, 20s. being about $3\frac{1}{2}d.$ per acre; whereas the payment of 5*l.* 3*s.* 4*d.* set up by the appellant as a modus for the small tithes alone, would amount to $8\frac{1}{2}d.$ per acre.

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The respondent further proposed to give in evidence,—first, The rate-paper before mentioned, to show that the non-render of tithe in kind, in respect of *Bagber* Farm, and the uniform payment of a sum of money in lieu of the vicarial tithes, during the period spoken to by the witnesses, were not peculiar to that farm, but that during that period, no tithes in kind had been rendered for any part of the parish; and that payments, similar to the one in question, had been, for the whole of that time, annually made by every occupier of lands within the parish; and that they had always been made on *St. Thomas's Day*, in pursuance of the general notice given in the church, and collected under the same paper, and by the same denomination, viz. as a tithe rate.

Secondly, (having proved a search in the respective registries of the dioceses of *Bristol* and *Salisbury*, (the proper repositories,) for the original endowment of this vicarage, and that none could be found, (although it appeared that no search had been made in the augmentation office,) the respondent's counsel proposed to read from a book, said to be an old ledger or chartulary of the abbey of *Glastonbury**,

* Vide Appendix.

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brought from the muniment room of the Marquis of Bath, (who is the owner of other estates formerly belonging to the abbey, concerning which memoranda were likewise contained in this book,) certain entries, in a character of hand-writing belonging (as was proved) to the latter end of the 13th or the beginning of the 14th century, or during the respective reigns of *Edw. I, II, and III*, relating to the appropriation of the rectory, and the endowment of the vicarage; by which it appeared, *that at that time the small tithes, separately and distinctly specified, and having separate and distinct values annexed to them, were assigned to the vicar,—and no money-payment, or modus, in respect of any one farm in the parish, was mentioned or alluded to.*

The same book or chartulary, in the early part thereof, contained an index or summary of the contents, entitled, “*Kalendar Sequentis operis*,” wherein, at the commencement of the enumeration of those instruments which referred to *Newton*, the following entry appeared, “*Deficit ordinacio vicarii Nywton.*”

To prove the custody of that book, the respondent called as a witness, the steward of the Marquis of Bath; who proved, that the Marquis was possessed of the estate of *Longbridge Deverell*, in the county of *Wilts*, and the manor of *Walton*, (formerly of the possessions of the abbey,) but his Lordship had no property of any description in *Sturminster Newton*:—that on the witness succeeding his father in the office of steward, he found the

the said book in the strong closet of his office ; —that all the old rolls relating to *Longbridge Deverell* and *Walton*, were kept in a particular room called the evidence room ;—and that the modern papers relating to *Longbridge Deverell* and *Walton*, were kept in the closet of the same office.

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From that book, so produced from such custody, the respondent proposed to read certain entries without date, beginning "*Portiones Ecclesie de Sturmyenstr*," &c. when the counsel for the appellant objected to the admissibility in evidence of the said book, and of the said entries therein contained ; but the Judge was of opinion, that the book and the entries therein, so proposed and offered to be given in evidence, were inadmissible : and the same were accordingly rejected as evidence on the part of the respondent.

And, thirdly, They proposed to read certain accounts of the reeves of the abbey for the manor of *Newton* (also found in the custody of the Marquis of *Bath*,) for the purpose of showing that the reeves obtained allowances and acquittances, in their accounts with the abbey, for various articles of small tithes arising from the demesne lands of the manor, as having been rendered in kind at various periods subsequent to the time of legal memory.

These, also, were objected to and rejected ; and a verdict was found in favour of the modus.

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IN the following *Michaelmas* Term an application was made for a new trial, on the ground (amongst other things) that evidence which had been tendered on behalf of the defendant at law upon the said trial, had been unduly rejected. A rule to show cause was granted; and the Court, after a full and elaborate argument of several days at the bar, directed a new trial.

On that occasion the judgment of the Court (after time taken to consider the arguments,) was delivered as follows; by

1814.

23d February.

GIBBS, *Chief Baron*. These two cases of *Bullen* against *Michel*, and *Williams* against the same, came before the Court upon a motion for a new trial. The trial was had on an issue directed by this Court, to try “Whether, from time immemorial, the occupiers or occupier of the farm and lands called *Bagber Farm*, have or hath paid, and have or hath been accustomed to pay, to the vicar of *Sturminster Newton*, on *Saint Thomas’s Day* in each and every year, a certain modus or ancient customary yearly payment of 5*l.* 3*s.* 4*d.* for and in lieu and full satisfaction and discharge of the tithe of hay and grass seeds, and of all other matters and things, except corn and grain, yearly arising, growing, and renewing upon and throughout the same farm and lands called *Bagber Farm* ;” and in the cause of *Williams* against *Michel*, a similar issue was applied to the farm which *Williams* occupied.

The

The case has been so fully and recently argued, that it is not necessary for me to go through the detail of all the facts that came out upon the evidence. We have received great assistance from the industry and ability of the counsel who have argued it, and from the candour with which they have laid before the Court what were the real questions arising in the cause. It is a cause of infinite importance, and embraces matters of considerable extent; it has given rise to points of great nicety and difficulty, and it is not to be wondered at therefore, if, on the first trial, all the facts were not attended to with that care and diligence with which, upon further consideration, it may appear that they ought to have been applied and directed. The verdict was found for the modus.

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The application for a new trial rests upon two grounds; first, that on the evidence which was produced, the verdict ought to have been found against, and not in favour of the modus, as the weight of evidence strongly preponderated that way; and next, that evidence was offered and rejected which ought to have been received. Upon the first point, without entering at all into the consideration of what effect that evidence would have on our minds, we are of opinion that if the case rested entirely on the Judge's report*, and if nothing was to be added to that which was received in evidence, there would be no ground for the Court to

* That report stated in substance, that the facts which have been before given as the foundation of this case, were in evidence on the trial.

interfere

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interfere and disturb the verdict which the jury have found. It was a question for their consideration ; they have drawn their conclusion from the facts before them ; and supposing those facts to be confined to the evidence that was produced before them, we should see no sufficient reason for disturbing the verdict which they have returned.

The next objection, that evidence was offered and rejected which ought to have been received, divides itself into three parts ; first, the vicar says, he offered in evidence the tithe-rate by which all the payments in lieu of tithe were made, and that that ought to have been received in evidence, but was rejected. Next he says, that he offered in evidence a chartulary, which he insists had belonged to the abbey of *Glastonbury*, which ought to have been received, and that that also was rejected. And next, that he offered in evidence the reeve's accounts, which ought to have been received, but were also rejected.

These objections rest upon grounds wholly distinct from each other. With respect to the first, the question is involved in some obscurity from the manner in which the report is worded ; but from the very fair and candid admission of the counsel, and by what appears from the questions put to the witnesses, it is evident that the real question was, *Whether that tithe-rate which contained an account of all the payments, by all who were called on to make those payments, on the same day, was or was not*

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not admissible evidence. Now just to render that intelligible, I will state that the parishioner, the plaintiff at law, proved clearly that a certain payment had been made by him and his predecessors for fifty or sixty years; and that was considered as *prima facie* evidence of a modus. It appeared on the cross-examination of one of the witnesses, that the father of the witness who had received this payment, received it, together with several others, under a tithe-book. We are therefore of opinion, that that tithe-book ought to have been received in evidence, as it contains a history of that collection of which the payments relied upon by the parishioner, as proof of his modus, constituted a part. But here we desire to guard from any conclusion as to the weight which it ought to have with the jury, or the extent to which it ought to influence their verdict; we studiously abstain from giving any opinion upon that point, and it will be for the jury, when they consider this, together with all the other evidence that will be produced in the cause, to say what weight is due to it, and whether, notwithstanding the evidence of the other payments at the same time, these payments which were made by this parishioner and his predecessor, still stand as satisfactory proof of a modus; or whether they were voluntary and conventional payments agreed on between the vicar and the whole parish, of modern date. That will be exclusively for the consideration of the Jury.

The next objection is, that a chartulary, found in the possession of Lord Bath, was offered in evidence,

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evidence, and rejected. This chartulary is found to contain an account of the license of appropriation of the parish, and likewise to contain an account of what the several matters were of which the vicar was endowed. The first objection to this evidence was, that it was not sufficiently proved that this book had ever belonged to the abbey of *Glastonbury*, which it was necessary to prove in order to let in the evidence. I take it to have been proved, (indeed it was admitted,) that search had been made in every place in which the endowment itself might be expected to be found, and that none was found; therefore a copy of it would be evidence. Then the question was, whether this book appeared, from the facts attending it, to have belonged to the abbey of *Glastonbury*. We should recollect that such a book as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown, and the Crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the Crown, and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go to only one of those grantees; and the only possible way of connecting it with the abbey is, by showing a connection between the possessor and the Crown, and by raising a probability that the Crown may have handed over the book to the present possessor.

The only mode of proof that occurs to me of that
fact

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fact is, to show that the present possessor of the book is now the possessor of certain lands which formerly belonged to the abbey, which, when the abbey was dissolved, passed to the Crown, and out of the Crown to this person; because, from what I have before stated of the history of these books, and the manner in which they would pass, if you can trace the estate from the abbey to the Crown, and from the Crown to the person in possession of it, it is probable the person in possession would have the book as connected with the estate. Now it does appear, that there are one or two descriptions of land, *Walton* and *Cluer* I think, of which mention is made in this book, which were the property of the abbey of *Glastonbury*, and must have gone to the Crown at the dissolution of the abbey, and it appears that Lord *Bath* is now the proprietor of those lands; there does, therefore, exist that sort of connection. There is a chain, composed of those links, which I have stated before were sufficient to connect the two together, and show a probability that the book reached the hands of Lord *Bath*, having passed through the abbey; for these estates of *Walton* and *Cluer* were part of the possessions of the abbey, and they must have passed to the Crown; they are now in the hands of Lord *Bath*, they must have passed from the Crown to him, and the probability is, that the book attended them in their passage. On this ground, therefore, we think the custody is so accounted for as to render that book admissible in this case.

It has been also objected (the objection of
custody

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custody being removed,) that still its contents do not bear on the facts in issue in the cause. What effect it would have upon those facts, we guard against intimating any opinion upon : and we do not mean, by sending it to a new trial, to send to the jury any opinion as to what their verdict should be, but merely as to what ought to be received in evidence. This book I must now take to be found in the custody of the abbot. It contains an account of the license of appropriation, and it contains likewise what I will only call, (to avoid giving it any peculiar name,) an account of the particular matters of endowment ; and the endowment not being found in the places where search has been made for it as its natural places of deposit, that list of articles found in the custody of the rector is admissible evidence. In what respect it ought to influence the verdict, or what effect it ought to have upon it, we wish it to be understood we give no opinion upon.

There is however one other effect I wish particularly to guard against. If it be held that this endowment, as it is called, should be proved to bear date within the time of memory, the parishioner is not to be turned round upon the form of the issue by that circumstance *. The point which it lies upon the plaintiff to prove is, in the terms of the issue, that this payment has immemorially been made to the vicar ; whereas, if the endowment was within time of memory, that is impossible : but the Judge may

* Vide *Prevost v. Benett*, Vol. I. p. 236.

endorse

endorse that special matter on the postea, because the point to be tried is, whether there has existed from time immemorial a modus which exempted the occupier of this farm from rendering tithe in kind, and entitled him to pay that modus; and whether that originated in the time of the rector, before the vicarage was endowed, or whether it was endowed beyond time of memory, is perfectly immaterial to the merits of the case: the fact to be tried is, whether the modus has subsisted. I hope it will be remembered, that that objection is not to be taken.

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The only remaining question turns upon the reeve's accounts. Those reeve's accounts purport to be accounts of the reeve of the abbey, allowed by the bailiff of the abbey; the reeve receives certain profits of land for the abbey, and he discharges himself by certain sums which he seeks to have allowed in his account, and which the bailiff, on behalf of the abbey, does allow. So that one side of the account, (according to the doctrine applicable to such instruments) the charging side, will be evidence, because the reeve charges himself; and the discharging side will be evidence, not only because it is part of the same account, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself, and in the other case, it is against the bailiff to allow his discharge. Now the articles of discharge contain certain payments, which the reeve insists that he made for the tithes of those lands, out of which the profit with which he charges

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charges himself arose, and those are tithes of lands within the parish of *Newton Sturminster*. As far as those accounts go to show that those tithes to which the accounts immediately relate, were at that time rendered, we think they are admissible. I use the word admissible studiously ; we do not say that they determine the point, nor do we say (whether they determine the point or not,) what effect that ought to have upon the verdict of the jury on the general question ; but we think that they are admissible evidence to prove the fact which they purport to announce, namely, that those tithes mentioned in the accounts were paid. What effect it would have, or whether it would turn out to be relevant to the point in issue, will depend on the view which is taken of the effect of that evidence by the Judge who tries the cause : but we are of opinion, upon the points I have stated, that this evidence is admissible ; and on that account, as well as on account of the magnitude of the case, and the satisfaction that is due to the parties who bring forward a case of so much importance, we think it ought to go to another jury.

I should mention, that upon the case of *Williams v. Michel* we say nothing, because that the Court will deal with hereafter. We cannot grant a new trial in that, because the plaintiff being dead, such trial could not take place. If the parson chooses to proceed for those tithes, it will be necessary to revive the suit.

In

In the case of *Michel v. Lord Rivers*, in which the bill was demurred to, and the demurrer overruled, I cannot give judgment, as I did not hear the argument; but I am desired by my learned brothers to say, they are of opinion that the vicar has had all the discovery he is reasonably entitled to.

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The Rule was therefore made absolute.

AT the following *Lent* Assizes at *Dorchester*, in 1814, the same issue was again tried before Mr. Justice *Bayley* and a special jury, when (the same evidence having been adduced as on the former trial, with the addition of the documentary evidence which had been then rejected) a verdict was found for the respondent.

The learned Judge (amongst other things) in his comments on the rejected evidence now produced by the respondent, observed to the jury who tried the cause, that the entries in the book called the *Chartulary*, commencing *Portiones Ecclesie de Sturminster*, &c. were not only evidence proper for their consideration, but most important in their effect, as tending to show, as well for what things tithes were payable within the parish of *Sturminster Newton* at the particular period of those entries, as the precise value of those tithes at that time; in which latter point of view, those entries would be found to bear very strongly on the case, and to militate against the claim of the appellant. And the jury, upon the evidence so adduced and sub-

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mitted to their consideration by the judge, found a verdict for the respondent.

In *Easter* Term following, an application was made on the part of the appellant to the Court, for a new trial; which was moved for by,

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Friday,
20th May.

Lens, Serjeant *, on the ground that, although the

* On a former day it had been proposed to tender a bill of exceptions, as the most usual and regular course of proceeding in such a case; but the Court seemed to think that that would be harassing the defendant, by affording the plaintiff two distinct modes of proceeding, which might be successively adopted, because if he should fail on the bill of exceptions, he might then afterwards move for a new trial. The majority also held, that the trial of an issue was not to be considered on a footing with common trials at Law, inasmuch as they were entirely under the control of the Court by which they were sent down, having for their only object to inform the conscience of the Court; and that therefore, unless the result should prove satisfactory, they might be sent down repeatedly, until that object were attained.

On that occasion, the three junior Barons (the Lord Chief Baron having already strongly expressed himself to be of the same opinion with Barons *Graham* and *Richards*,) delivered their sentiments as follows:

GRAHAM, Baron. I have known a great number of issues directed for the purpose of informing the conscience of the Court, and I do not recollect any one which was treated as a record of an independent action. Perhaps the way most consonant with general practice, would be to bring forward the question now proposed to be discussed in the shape of an application for a new trial, on the ground of a mis-direction of the judge; and if we should mistake the point of law, it might go to a higher authority upon any erroneous judgment to

the chartulary which was produced on the second trial, had been pronounced by the Court to be admissible

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to which we might come upon the motion. That would be more consonant with the common and ordinary course in Courts of Equity.

I have known many cases where issues have been directed, and on applications for new trials having been made in the Court to which the cause had been sent, the parties have been obliged to bring back the record from that Court to the Court which directed the issue.

It would be quite anomalous, according to my recollection, and the experience I have had in the profession, to treat an action of this sort as an independent action, unconnected with the equity cause, of which it is merely a branch.

WOOD, *Baron*. I must own I think a feigned issue differs not at all from another action; and that when once it gets into a Court of Law, it is subject to all the rights and remedies that all other actions are.

Bills of exceptions are not common in any case, but I should think that there is no objection to a bill of exceptions in this case any more than in any other. If we send a question into a Court of Law, they must decide it according to the legal rules of evidence; and if there is any objection to the evidence, that is a matter for the consideration of a Court of Law, not only of this Court, but of any other to which it may be removed by writ of error. There is no rule of evidence established in this Court different from the rules which prevail in other Courts; and whether the learned judge who tries a feigned issue, properly receives or rejects evidence, may always be liable to be made a question for further consideration; and the proper way of putting it is by a bill of exceptions.

RICHARDS, *Baron*. Perhaps it may not be improper for me to state my impression upon this subject.

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admissible in evidence, (loose as it was,) it was expressly restricted by the Court as to the application

I have never known an instance of the trial of an issue directed out of the Court of Chancery, being treated throughout as a common action at Law. I have always understood that an issue directed by a Court of Equity, is directed solely for the information of that Court, and that it is in the hands of that Court. It may be modelled in any shape. And the Court may compel the parties to admit evidence which is not strictly legal evidence, and it has other distinguishing incidents. I remember one instance in particular, which seems to me to show very manifestly the distinction between a feigned issue and an action at Law, which occurred in a case that came before the present Chancellor. That is the case of the Minor Canons of *St. Paul's v. Morris* *. There had been an issue directed by the Court of Chancery, which was tried at bar in this Court: an application was made to the Court of Chancery for a new trial, on account of the rejection of what was considered to be material evidence; and the Lord Chancellor was of opinion, upon a full discussion of the matter, (although he thought that the evidence which had been offered and rejected ought to have been received) that there ought not to be a new trial. His Lordship, in that case, says, "New trials, after trials at bar, have been granted here, when the Courts of common Law would not grant them; and upon this consideration, whether the cause was tried in such a way as to be satisfactory; and if the Jury have given such a result, the question which I think the Court ought to ask itself is, whether the Jury would miscarry in making a different conclusion upon the rejected evidence." He also said, "If that evidence had been admitted, and the Jury had brought in a different verdict, I would have sent it again to new trial after new trial, till the right conclusion had been drawn. I am master of all the facts from the learned Judge's report; and I see that if that evidence had been admitted, and the

* 9 Ven. 153.—Vide also, *Pemberton v. Pemberton*, 11 Ib. 53.

"evidence

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cation of its contents, and the effect which it ought to have on the minds of the jury, and could only be read for the purpose of showing the existence of an endowment of the vicarage, if that had been disputed; but that it was still objectionable, when applied to any other purpose. —That as, on the second trial, it had been used to prove the value of the various titheable articles of which the vicar had been originally endowed, which was offered as evidence to contradict the *modus* set up, by showing that the tithes were then received in kind, and not by money-payments; and that according to the amount of the then value, as recorded by the paper, the sum of 5*l.* 3*s.* 4*d.* the *modus* for *Bagber* Farm alone, was nearly equal to the value of the tithes of the whole parish, of which that farm formed only a small part: it was therefore contended, that the document, although admitted by the Court as evidence for some purposes, was not so for others; and that it was particularly objectionable when put in to prove a fact (*dehors* the instrument) which was to affect a third person, not a party to that instrument, or in any way cognizant of it;

“evidence had weighed with the Jury, it would have operated “injustice, which I should not have endured.” From that case, it appears to me, that there is a very great distinction between an issue directed out of a Court of Equity, and an action at Law, and that they are governed by different rules. The rule in Courts of Equity is, that the evidence must be applied in such a manner as best to afford that information which the Court seeks by the trial, to direct what is technically termed its own conscience.

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it ;—an instrument made by parties, not only not in the same, but a contrary interest from the person sought to be affected by it: for however different the interests of a rector and vicar might be between themselves, yet with respect to the land-owner, they could have but one common interest.—That the rights of the church could not be thus regulated and established among themselves, by the fabrication of documents declaratory of those rights which were in future times to be used against third persons, who might not have had the means of knowing even that such documents were in existence; and that therefore, when the general admissibility of the paper had been established by the Court, guarded as it was by an anxious disclaimer of any opinion being given as to the particular effect and operation, or relevancy of its contents, its use should have been at least more circumscribed by the learned judge who tried the cause, if not wholly confined to the proof of the former existence of an endowment; although in that case it would have been useless, because that was admitted by the defendant, and therefore formed no part of the issue.

The learned Judge, in his report of the evidence, said, that as the character of the hand-writing gave reason to believe that it was contemporaneous with the endowment, he thought it evidence of what the endowment had been, and of what it consisted, as the monks must have known what the state of the parish was at the time of the endowment, and the value of each article of tithe, and could not have been ignorant of the fact, if there had been so large a money-

money-payment at that time, for the farm in question; and that he thought it evidence that the money-payment insisted upon did not then exist, and with that view admitted it to be put in and read.

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Pell, Serjeant, Taunton, W. P. and Gifford, now showed cause. They objected, that the present motion was in effect nothing more than an attempt to bring under the re-consideration of the Court their former decision on the previous occasion; for although the objection of the custody of the paper was then the principal subject of discussion, the doctrine of *res inter alios acta* was also very much pressed and ultimately disposed of, as well as every other objection now attempted to be set up.

12th December.
Serjeant's Inn.

The case was most ably and learnedly argued, and at very great length; but all the arguments which were used on either side are repeated or fully noticed in the judgment, which the Court this day delivered *seriatim* (there being a difference of opinion) on the whole case.

RICHARDS, *Baron*, having detailed the circumstances which led to the motion for a new trial on the finding of the Jury in the first instance, and expressed his approbation of, and concurrence with the judgment of the Court, as delivered by the late *Lord Chief Baron* on that motion, (his Lordship not being then on the bench,) proceeded thus :

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25th January.

The cause went down to be tried again, the paper which had been previously rejected having been

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been considered admissible evidence, and it was not confined to any particular points of proof.

The issue on that occasion was as before, the immemorial annual payment of a modus. There could have been no doubt of the vicar's right, for that must have been admitted on the record in such an issue. Then the question arose, whether the paper ought to be applied to the proof of any fact beyond the existence of an endowment. Now I cannot but think that, there being no question then as to the existence of a vicarage or endowment, the use of the document must necessarily have been extended to that part of it which did not purport to be evidence of an endowment. And I also think, that when this paper was once produced, it became, in the absence of better evidence, after search made, the best evidence of an endowment, and must have been considered as of commensurate authority, as far as it went, with the endowment itself; and consequently, whatever objections were taken to the use of this document, would have been equally applicable to the very endowment.

It is a general principle, that whatever evidence is once received, it must be read throughout; and here particularly the Court could not have permitted this paper to be read, but for the express purpose of its other contents, the endowment having been admitted.

Now if an endowment had been produced, which had contained a description of the state of the parish as to the titheable articles which it afforded, although
that

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that might also have been objected to, as being *res inter alios acta*, it would have been evidence of the contents of that instrument; and I consider this paper also as furnishing evidence of its contents, though subject, certainly, to circumstantial observation. I therefore cannot but be of opinion that it was proper for the consideration of the Jury, and that we must allow it to have whatever weight they thought it was entitled to.

The Court having once pronounced that the paper was admissible in evidence, it would be extraordinary if it should now say that there should be a new trial, because the Judge had acquiesced in the solemn decision of the Court; and I think that even if this Court had not so decided, the Judge ought to have received this document, and to have treated it as he has done.

I might rest the case here, but I will proceed further; and for the sake of argument, I will suppose that the evidence objected to was of a more doubtful nature than it really is, I would still say, that it ought to have been received. In such cases the rules of Courts of Equity differ materially from those of Courts of Law. It is of the essence and constitution of Equity, to decide at once on facts, as Juries do, except in one or two instances, as that of a heir at law disputing the validity of a will, and a rector suing for tithes. I do not recollect any other case. In all cases besides, a Court of Equity may decide definitively without a trial at Law.

If in this case the evidence which directed the
Jury

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Jury in their verdict, was sufficient to satisfy the Court, the Court will not say to-day what influence it ought to have had. The Jury are merely, in cases of issues, the means by which a Court of Equity gets at facts through the medium of a *viva voce* examination, and cross-examination of witnesses. But the Court, after all, exercises its discretion; thus, in the present case, the Court sent it to a Jury for its own satisfaction: they were dissatisfied with the inquiry below, and therefore they sent the cause down again for further investigation.

In this case, I think the evidence given in support of the payment, as it appears on the report, is very unsatisfactory; some of that evidence even goes to negative the modus, and in those receipts which are given for money paid for the tithes, no mention is made of modus. There are several of the receipts not given for a money-payment in lieu of tithes, but for one year's rate, and some generally for the farm, and so on. The sums paid, therefore, have been by no means regularly dealt with as moduses, and are never expressed to be so paid; and therefore, I confess, if the Jury had returned the same verdict without the evidence of this paper, I should have been satisfied, and would by no means disturb it. It would then have been a case of greater obscurity, perhaps; but I should have prevailed on myself to have been satisfied that the Jury had had sufficient evidence laid before them to warrant their conclusion: and if I should even then have thought them right, when I find that they have had the additional and corroborative evidence of this paper before them, I must necessarily

necessarily incline much more strongly in favour of their verdict, without at all intimating what weight I think the paper ought to have had in their decision.

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I am, however, fully convinced that the weight to be attached to the effect of that paper, whatever it might have been entitled to, was purely a question for the Jury; and I must consider myself bound by their judgment.

WOOD, *Baron*, stated the case; and observed, that when the cause went down for a new trial, the objection to the *modus* in point of form*, arising from its being probable that the endowment would be proved to have been made within legal memory, although the *modus* was alleged to have been paid to the *vicar* from time immemorial, was particularly guarded against.—The issue (his lordship continued) was therefore on the fact of the immemorial payment of the sum alleged to be a *modus*, and so it must now be taken.

On the trial, the plaintiff established a *prima facie* case, by proving the payment of this sum of money as far back as living memory could go. Then the defendant produced a manuscript book, endorsed “*Chartulary of Glaston Abbey*,” found in the possession of the Marquis of *Bath*, containing two documents, one purporting to be a copy, or in the form of a copy of an appropriation, dated 1269, made by the Bishop of *Salisbury* to the Abbey of *Glastonbury*, of the fruits and profits of the rectory of

* Vide the judgment, ante, page 412.

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Sturminster Newton, then being in the patronage of the abbey, reserving to the bishop a power of ordaining a vicarage in the same church, which should be worth, to be let, ten marks, or 6*l.* 13*s.* 4*d.* at the least; and the abbey were to take possession of these fruits and profits on the cessation or decease of the then present rector.

The other document on which the present question arises, I know not what to call. It is without date, and entitled "*Porciones ecclesiæ de Sturmys-tre assignate vicarie ordinande in eadem perpetuis temporibus duraturæ.*" Then follows an enumeration of house, garden, lands, and tithes, with the value of each article, amounting in the whole to 23*l.* 16*s.* 6*d.*; and there are various burthens imposed on it to the amount of 3*l.* 19*s.*, leaving a clear income of 19*l.* 17*s.* 6*d.* The appropriation professes to be made to the monks of *Glaston*, and the reason assigned is, because they had been afflicted with misfortunes, and had been and were borne down with the weight of their debts. If any such endowment ever took place, the amount must have been 19*l.* 17*s.* 6*d.*; and that is highly improbable, because the only power which was reserved of endowing the vicarage, limited the amount to 6*l.* 13*s.* 4*d.* and there is no reason given why the monks of *Glaston* should have exceeded it.

On the first trial of this cause, the Judge thought the document was not sufficiently authenticated as to the propriety of its custody, to be admissible as evidence, and therefore rejected it: neither the
rectory

rectory of *Sturminster Newton*, nor any estates in the parish, having been proved to belong to the Marquis of *Bath*. On the motion for a new trial, it was granted, on the ground of the Marquis of *Bath* having been connected with the abbey, because he had become the owner of part of other possessions of the abbey, through the Crown. And on that ground, of custody alone, I thought the new trial had been granted. It seems the *Lord Chief Baron*, and my brother *Graham*, thought otherwise, and that the question of its being found in the proper custody, was not the only ground, but that it was also agitated, whether it was not generally admissible in evidence; and that it was held that it was. But, if the late *Lord Chief Baron* thought so, I protest against assenting to that opinion, either then or now.

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I have frequently known coucher books, and other documents coming from the custody of persons connected with the dissolved abbies, offered in evidence: and the first question always arises on the authenticity of their custody; the next is, whether they are admissible evidence from the nature of their contents. When the question in the present case is confined to this,—does the book come from the proper custody? I agree that it does. As to the other point, of whether it is evidence, I thought that that was for the decision of the Judge who tried the cause; and I do not find by my notes, that that question was argued on the motion; but it was of course mentioned, to show that the contents were applicable to the subject-matter in dispute.

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The first point on which the new trial was moved for was, whether there ought to be a new trial on the merits of the case, according to the preponderance of the evidence on both sides. The second was as to the rejection of the tithe rates, and of other documentary evidence which ought to have been received, among which were the bailiff's accounts and this book; and as to the admissibility of these two documents, which form part of the book, nothing was pressed in argument, but that the book which contained them did not come out of the proper custody; but no argument was made as to the reception in evidence of their general contents, and I certainly only meant to give my opinion on the first point, of the custody in which the book was found. I say thus much in order to free myself from any imputation of inconsistency in my opinion.

I now come to the point immediately before us. The Judge received the documents in evidence, supposing this Court to have decided that they were admissible, to prove that the money-payments did not then exist. The plaintiff's counsel objected that they were not admissible *for that purpose*, and that therefore they could not be admitted at all in this case; because, from the form of the issue, the question of endowment or no endowment did not arise, for the plea of *modus* admits the vicar's title, if the *modus* should not be established. It is because the endowment was not the question, therefore, that the document was, as evidence on that issue, totally irrelevant. Inasmuch as it purported to be a copy of
or

or extract from an endowment, it might in that view have been material; but where the title was not the question, it could not bear upon the issue.

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My objection to the second document which was offered as evidence of the endowment, is that it is impossible to ascertain what it is. Is it a copy of an endowment? Certainly not. Is it any extract from any endowment? It cannot be called any such thing. When this document or entry was first made, there was no endowment in existence, whatever there might have been in contemplation. This paper purports to be a prospectus of some future endowment to be made by the bishop, but it is no proof of a subsequent endowment having been made, or of its contents.—(*His Lordship here commented much on the effect of the word ordinande as applying to some act yet to be done.*)—It is altogether a species of evidence unknown to me, even as evidence to prove an endowment; for its reception amounts to admitting, that proof that something was to have been done, is evidence of its having been done. From the nature of the document itself, therefore, it is inadmissible. But supposing it were evidence of an endowment having at any time actually existed, is an endowment, not followed by perception, to be set up? In the case of a vicar, who has received tithes, filing his bill for the recovery of them when withheld, it perhaps might be some evidence of his original title; but here the plaintiff admits the endowment: how then can it be used on this precise issue, of the sum in question having been immemorially paid, to prove that no modus existed at the time when

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when the vicarage was endowed? Is it not, in such a case, purely, *res inter alios acta*? And I consider, that there is no one sacred maxim in law more founded in good sense and justice, than that *res inter alios acta alteri nocere non debet*. As between a rector and vicar, an endowment is evidence, because both are parties to the act; but the landholder is a third person, and ought not to be affected by it, for he is neither party nor privy to the act. If the act of the rector could not at the time have affected the landholder, by extinguishing a *modus* thenceforth payable to the rector, by means of an endowment of a vicar, what is there that can now give this paper that power and effect? When did it begin to be so effective, or what has made it so subsequently? Does its having remained dormant for five hundred years in the library of the Marquis of Bath, without ever having been acted on, give it such efficacy? Certainly not. *Quod non valet ab initio in tractu temporis non convalescet*. Suppose an improper rector and vicar had signed a declaration twenty or thirty years ago, that the alleged *modus* was only a temporary composition, would that have been evidence against the landholder? And what difference is there in principle, between a similar declaration having been formerly made by a landholder on his own behalf, and an endowment. The landholder says, and proves, I have always paid a sum of money in lieu of tithes, for my farm, to the rector and vicar successively. In answer to that the vicar produces a paper, with which the landholder is wholly unconnected, from the contents of which it is made to appear, that such a payment could not always have existed:

existed : can that be evidence against one who is not a party to it, and who has never heard of it, or had any opportunity of contradicting it or setting it right? Certainly not. Suppose that, in support of a prescription for a right of way over another's land, an old conveyance from a former proprietor, reciting that there was no such right, was produced : would that be evidence to prove that such a right never did exist? I think it certainly would not.

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What was said by Lord *Hardwicke* in *Fox v. Adye (a)*, is extremely applicable to the present point. One of the questions in that case was, whether the making the tithe grass into hay, for the benefit of the rector, could be a legal consideration as to the vicar, who claimed the small tithes of herbage by bill ; and they set up that defence, which they contended discharged them from payment of tithes to the vicar. Lord *Hardwicke* says, " The vicarage was derived out of the parsonage, " and the parson, by consent of the patron and " ordinary, endowed the vicar with these small " tithes ; this shall not prejudice the parishioners, " nor deprive them of the benefit of enjoying their " modus, which they before were entitled to." His opinion therefore is, that the endowment could not affect the modus : and I draw this inference from it, that if endowment can not of itself destroy a modus, it cannot be received in evidence to prove any fact that tends to the destruction of a modus ;

(a) 2 P. Wms. 520.

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for it would be absurd if that were not the consequence.

Then by what rule of evidence is it that judgments, decrees, or depositions are not admissible in evidence to affect strangers, but are only received as against parties and privies, or persons claiming under them. It is perfectly clear that the general rule is, that a verdict can not be evidence in an action against one who was not a party, but a stranger to the former proceeding, and who had therefore no opportunity of examining witnesses in his defence, or to appeal against the judgment. The same rule applies to depositions as well as to verdicts. In the case of *Rushforth v. The Countess of Pembroke and Currier (b)*, a bill was preferred in the Exchequer Chamber for suit of a mill, and a trial at law being directed, the Countess offered in evidence depositions taken in a former suit, brought by *Currier* against the same plaintiff and others, tenants of the Countess, upon the same subject; but as the Countess was not a party in the former suit, the depositions were rejected. On a motion for a new trial being made, the Court were of opinion, that the former depositions ought not to be made use of at the trial as against the Countess, because she was not a party to the suit; and as they could not be read against her, no more could they be read for her, because she was not bound by them; for not having been a party to the suit, she was not in a capacity to

(b) Hardres, 472.

examine

examine any witness, or prefer any interrogatories in it; for that reason also, she could not make use of the depositions of any one who had been a witness in it. That case shows how strictly the rule is observed as to verdicts and depositions.

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Now let us suppose that there had been an ancient verdict or decree against the rector, in a suit between the vicar and the rector, and that the vicar had thereby recovered the tithe in kind of this very farm; would that decree have been admitted as evidence against the landholder, to prove that there was no *modus*? Most clearly it would not. In the case of *Benson v. Olive (c)*, on a bill filed in this Court for tithe hay, by a former impropiator, against *Semain*, wherein the plaintiff's title was affirmed, the Court would not permit the decree to be read, because the then plaintiff could not show that the defendant claimed either the same lands, or under the same title as *Semain*. And if a verdict or decree cannot be received in evidence against a third person, how a document of a less solemn nature, between other parties, can be admitted to affect third persons, I cannot understand.

The learned judge has reported as the ground on which he received this document in evidence, that as the monks were conversant with the state of the parish, and the value of titheable articles, if so large a sum of money had been paid they could not have been ignorant of it.

(c) Bunb. 284.—Gw. 701.

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Now with deference to that learned judge, and others who may be of his opinion, I beg leave to say, that ignorance or knowledge of a fact is not the principle upon which the rule of *res inter alios acta* has been established not to be evidence against third persons. In the case of verdicts or decrees, or depositions, or written documents *inter alios*, you reject them, without inquiring or considering whether the parties to them had the means of knowledge or not. In most of those cases wherein verdicts and depositions have been rejected on that principle, the parties to them had the means of knowledge; still the evidence has been constantly rejected, (whatever means of knowledge they might have had,) because the party to be affected by them had no participation in the transaction, nor any opportunity of examining into the facts, or contradicting any false statement, or correcting any mistake or error which might have been made as to his rights: and upon that principle alone the evidence has been rejected, and the means of knowledge of the parties has had nothing at all to do with it.

It has been urged, that the rule of *res inter alios acta* admits of many exceptions, as in the case of Pope *Nicholas's* Taxation, the Ecclesiastical Survey in *Henry VIII's* time, and deceased rectors or vicars books; but the admission of such evidence first originated in this Court, and has not met with perfect approbation from the other Courts in *Westminster Hall*. And I take the liberty of saying, that if they were *res integra*, I should hold that they ought not to be received in evidence.

With

With respect to Pope *Nicholas's* Taxation, we have in this very cause a striking proof that it never ought to have been received in any case as evidence of value. This vicarage, according to the document admitted in evidence, is supposed to be endowed in 1269, or some time between that period and 1291, with specific articles, each separately valued, and amounting in the whole to 23*l.* 16*s.* 6*d.*; and in Pope *Nicholas's* Taxation in 1291, (twenty-two years afterwards,) the rectory and vicarage together are valued at no more than 23*l.* 6*s.* 8*d.*; viz. the rectory twenty marks, which is 13*l.* 6*s.* 8*d.* and the vicarage fifteen marks, which is 10*l.*; so that both rectory and vicarage are not valued at so much as the vicarage alone is supposed to be endowed with only twenty-two years before, or less. Now does not this prove, either that no such endowment ever took place, or that the taxation is a fraud and a fallacy?

Upon the last trial Pope *Nicholas's* Taxation was not produced, and with good reason; for after the defendant's counsel had succeeded in getting the supposed endowment received in evidence, if he had produced Pope *Nicholas's* Taxation, it must have cut it up by the roots. It is from the admission of such evidence that this country is deluged with tithe suits.

But admitting that the Taxation and Survey are evidence, still they are very distinguishable from the document in question. They are public acts of state, made under authority, and known to all

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men at the time ; whereas the present document is a thing made between private parties, without any privity or knowledge of other persons.

As to deceased rectors and vicars books, that species of anomalous evidence has been established on a very slender foundation indeed. The first case I find on that point is *Legross v. Love-moore* (*d*), in the year 1679, in the Exchequer. There entries in a vicar's book were rejected by the judge on the trial, and the plaintiff was nonsuited ; but a new trial was indeed afterwards ordered, on payment of costs, and then it was only *by the defendant's consent* the book was ordered to be read in evidence. The next case is Lord *Arun-del's* case (*e*), in 1718, in the Exchequer ; and the whole of the case, which is only a short note from *Viner*, amounts to no more than that books of accounts, memorandums, &c. of a preceding vicar may be made use of as evidence for his successor, to support his demands in case of tithe, &c. by *Bury*, Chief Baron, and Baron *Price*. Whether this important point was ever argued or not, does not appear ; and upon this determination of two Barons, the rule it seems is now to be established, although so many judges have expressed dissatisfaction with it.

Another class of cases have been cited, where entries by deceased persons have been received in evidence ; such as bailiffs accounts, stewards accounts, entries by a man-midwife of the time of delivering

(*d*) 1 Gw. 529.(*e*) Ib. 620.

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a woman of a child, &c. I will not go through and comment upon every one of them, but I will take the principle of all those decisions from what Lord *Ellenborough* says in the case of *Doe* (on the demise of *Reece*) v. *Robson* (*f*); where it became material to show the due execution of a power, to prove that the lease was actually executed on a day subsequent to its date, and where entries in a deceased attorney's books were admitted to be read, to fix the actual time of execution. His Lordship there says, the ground upon which the evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time, a competency in them to know it. In the present case, indeed, the rector and vicar, when the endowment was made, might have had a competent knowledge of the tithes and emoluments mentioned in the endowment; but there was not a total absence of interest in them to pervert the fact, because they had an interest, or at least might have had an interest to destroy the modus, and establish a right to tithes in kind. Therefore, the second part of the rule so laid down by Lord *Ellenborough*, with these exceptions, does not apply to or support the present evidence. I am not for going on making exception after exception, till at last we have entirely frittered away all our rules of evidence, and have no standard left on which we can rely, and every thing will become admissible that can afford a probable guess or vague conjecture as to the existence of a fact.

(*f*) 15 East, 32.

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Upon the whole, therefore, I am of opinion, that the second document ought not to have been received in evidence :

First, because as no endowment was necessary to be proved by the defendant on this issue of *modus* or *no modus*, it was therefore irrelevant.

Secondly, because the document, from its imperfect and incomplete nature, (neither purporting to be a copy or extract from any endowment that ever did exist, but a mere plan or prospectus of an intended endowment, which is not shown by further proof to have ever been carried into execution,) is therefore also inadmissible as evidence in any case.

Thirdly, because if it were proof of an endowment, yet as that endowment itself (if it could be produced) would not have been admissible evidence for the purposes for which this paper was received, as against the landholder; for being an act done by third persons, without his assent, privity, or knowledge, the accuracy or correctness of which those persons, whom it is afterwards attempted to affect by it, could have had no opportunity of assenting to or dissenting from; it was therefore, as to them, *res inter alios acta*. And on these grounds I think that there ought to be a new trial.

GRAHAM, *Baron*. The question is, whether the Judge did right in suffering that part of this instrument which estimates the amount in value of the small

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small tithes belonging to this vicarage to be read, for the purpose of being taken into consideration by the jury. It was not, to my recollection, argued, nor could it be argued, after the judgment of the Court on the first motion for a new trial, that the instrument itself was not to be read in evidence ; but it has been boldly contended, that, (whatever be its proper denomination, and even if it were a formal endowment,) as between the vicar and the landholders resisting his right to tithes in kind, it ought not to go to the Jury, in proof of the non-existence of the money-payment to affect the *modus* pleaded. It is necessary to refer to what was the decision of the Court upon the motion for this new trial, and the arguments that were then offered. For my own part, I was in the dark from the beginning to the end as to what passed upon that occasion, if the determination of the Court, which was most ably delivered by the late Lord Chief Baron, was not, that the book, coming from the proper custody, was to be received in evidence ; and I have no conception of such a construction of that decision of the Court, as that the only import of it was, that from its having been found in the proper custody, it might be carried down to *Nisi Prius*, but that the Judge looking into its contents should tell the Jury, that this or any part of it was not the subject of their consideration. And I am clear my brother *Lens*, who argued the case, did conceive that those contents, so far as they established some particular matters, might be competent evidence, but he confined his objection to that part of them which purported to state the value of the tithes at that particular period,

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or that the tithes were then paid in kind, for that they were, as to those points, *res inter alios acta*; because the bishop, the appropriator, and the vicar, as we are to understand, had all a fellow-feeling and common interest to enlarge the patrimony of the church, and to destroy and defeat the rights of the laity.

In arguing this point, the counsel for the plaintiff have very properly, according to my judgment, laid aside the string of cases from *Warren v. Grenville* (*g*), and *Barry v. Bebbington* (*h*), to that of *Doe* (on the demise of *Reece*) *v. Robson* (*i*), as exceptions out of the rule of *res inter alios acta*, upon the principle that the act done or recognised is against the interest of the party doing or adopting it. But if Lord *Ellenborough*, in the later case, is correctly reported to have stated the principle on which these cases stood, I am not clear that this case does not fall within that principle. He says, “ the ground on which this evidence has been received is, a total absence of interest in the persons making the entries to pervert the fact, and a competency to know it.” Now it becomes extremely material to see what really is the nature of this instrument; and I hope my construction of it will appear to have some foundation. It is clear that it is not an endowment. It is not a copy of an endowment. It is not an extract from an endowment. I take it to be clear that at this period, there was no formal endowment under the seal of the

(*g*) 2 Str. 1129. 2 Bur. 1072. (*h*) 4 T. R. 514.

(*i*) 15 East, 32.

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ordinary. The entry in the book, "*ordinatio deficit*," might mean that it was lost; but the title to the entry satisfies me that "*deficit*" meant,—was defective, or was not then ratified by the ordinary. Its title imports this,—"*Portiones Ecclesiæ de Sturmynster, Assignate Vicarie ordinande in eadem perpetuis temporibus durature.*" It is not material whether you refer "*ordinande*" to "*Portiones*," or to the last antecedent, "*Vicarie.*" If the former, it reads thus, portions of the *Ecclesia* assigned to the vicarage, and to be ordained and settled by the ordinary in *perpetuum*; if the latter, it means portions assigned to the vicarage, which vicarage is to be ordained and endowed in *perpetuum*. Both constructions are substantially the same, and express that the ordinary's seal or fiat was to be affixed or obtained. Then, I think, this entry purports to be a memorial or authorized document of what the abbey itself had assigned as the portions of the vicar, or person by them appointed to perform the spiritual functions of the church. It is a memorandum of the project, or particular of the provision which the abbey itself had made for their vicar, subject to the ordinary's approbation, and which had not yet received the sanction of his seal.

Before the statutes of *Richard II.* and *Hen. IV.* it is a well known historical fact, that the bishops claimed and exercised the right of compelling a provision for the curates or vicars appointed by the regular clergy in their appropriate churches; many of the abbeyes resisted, and threw themselves upon the

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the authority of the pope, or made assignments (which was the appropriate form) of themselves, without consulting either. There is a very learned argument of Mr. Baron *Comyn*, while he was at the bar, and which is reported by him in page 508 of his Reports, where he quotes one of the constitutions of *Ottobon*. *Ottobon* was the pope's legate in this country in the time of *Henry III.*; and his constitutions and ordinances were observed by the clergy, and form the ground-work of many ecclesiastical regulations to this day. I take the passage from the Report in *Comyn*, who, referring to it, gives it the date of 21st April, 52d *Henry III.*; and it is to this effect, "*Universi Religiosi qui ecclesias in proprios usus habent si vicarii non sunt positi in eisdem infra sex mensium spatium vicarios diocesan presentare non omittant quibus sufficienter,*"—(which shows that this ordinance was perhaps the basis of the statute of *Richard II.*)—" *Quibus sufficienter pro facultate ecclesiarum assignent portionem,*" (that is, the monasteries themselves shall do it; and if that be not done by them,) "*Alioquin diocesan id facere studeant.*" So that it is perfectly clear, that long antecedent to the statute of *Richard II.*, the ordinaries did provide for the proper provisions of the curates or officiating clergy, and regulated the portion that should be assigned to them; and I need not say, that the constitutions of *Ottobon* were long observed by, and governed the conduct of the regular and secular clergy.

Selden, in his History of Tithes, in the third volume,

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volume, page 1262, (which is also referred to by *Comyn*,) says, "Nor was there any perpetual certainty of the profits of their presentees, (that is, the person, the appropriate person presented to any vicarage,)" meaning they had no regular establishment, "till the monks, by composition with the ordinary, or by their own ordinance," (which I take it was the act of the abbey of *Glastonbury* at this time,) "which prescription after confirmed, appointed some yearly salary in tithes, or glebe, or rent, for the perpetual maintenance of the cure; which salaries became afterwards the endowments of perpetual vicarages." So that these assignments or assignments of portions of tithes had, in after ages, the validity of established vicarages.

If this be the true construction of this instrument or memorial, (and I really think, upon attentive perusal of it, it is impossible to give it any other construction,) that it was an assignment by the abbey itself, not yet ripened into a complete and formal endowment, but waiting the sanction and approbation of the bishop; and, appearing so to have stood at that time, it would at this day have acquired all the validity of a vicarage established by a regular endowment—if this be the true character of this instrument, it was extremely important, and even essential, to state the fact of the value of the portion assigned to the vicar, in order to satisfy the ordinary that the vicar was completely provided for; and that is still more strongly evident, from the condition imposed upon the original appropriation to
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this abbey, that they should establish and provide for a curate up to a given sum at least. The sum mentioned, I think, in the ordination, is only ten marks; but as it did require an establishment to a given value, when the convent and the society itself had assigned portions, it was an essential part of that instrument, that it should specify what the value of that provision was, in order to show that it did come up to the measure appointed, or that, in point of fact, they had been more generous than was required of them: and therefore, the value is of the very essence of the instrument, and the main object of its design.

Now it is with this view, in explanation of this instrument, that I stated originally, with reference to the exception to the cases of *res inter alios acta*, that this might be received, on the ground of its being against the interest of those who framed it, to set the value low. It was unquestionably for the interest of the monastery, to set the value of the assigned portion at the highest, that the bishop might be perfectly satisfied. They would therefore rather over-value, than under-value the tithes set out. With this view the instrument sets an annual value upon the manse, upon the glebe, upon the housebote, upon the haybote, and upon the firebote, in the lord's wood; so that that is perfectly consistent with the nature and import of the evidence. I wish much that this matter may be understood, and that the effect of such documents as these, when offered in evidence, should be clearly and distinctly ascertained;

tained; for if they have any thing of truth or weight in them, a thorough knowledge of them may be the means of avoiding further litigation.

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The interpretation which I put on this, appears to be confirmed by subsequent entries in this very book which has been produced, by which it appears, that these portions were entered there with the express view of satisfying the bishop that they did form a competent or sufficient provision for the vicar. They were presented to the official of *Salisbury*, by an inquisition upon oath, in 1280, probably by three or four rectors of neighbouring parishes, and others, taken, as appears, from these instruments, in consequence of some mandate which he had issued to the Lord of *Chardestock*, to inquire of the portions and their value, in order to settle the disputes between the abbey and the vicar, as to the value and the nature of the provision; concerning which the instrument recites, "there is a difference of opinion between the abbot and convent, and the vicar. To remove the matter of the present and future contention, that we may be able to tax and ordain, or endow the vicarage, *certis finibus*." I happen to have a copy handed up to me in which "*certis finibus*" is translated,—certain rates: but it appears clearly, that it means that the vicar should be endowed with distinct tithes from those belonging to the appropriator, and that the respective portions belonging to each should be thereafter distinctly ascertained.

Then, in confirmation that this really was the effect

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effect of this prospectus,—and when I call it a prospectus, I do not mean to speak of it as an imperfect instrument, but as an assignment (for that is the appropriate term,) by the abbey, which, whether the bishop approved of it or not, would in time have all the validity of a regular endowment; for, from the constitution of *Ottobon*, which I have referred to, it is quite clear that they could make such provisions, (not merely temporary) but to stand to all future times: and therefore, a vicarage established upon the footing of that assignment, even though it never had been followed up by a regular endowment, would have, in subsequent times, all the effect of a regular endowment.—In confirmation, I say, of the construction which I have put on the document, there follows another title, “*Taxatio Vicar. de Styrminster*,” which, with the note, “*Ordinacio Vicarii deficit*,” are, together, quite conclusive; for it is obvious, that they were waiting the result of the commission which had been issued by the official of *Salisbury*; but that not having been made, from whence we are fairly to conclude that the bishop was satisfied with the provision made for the vicar, they go on to say, “*Ordinacio Vicarii deficit*,” as a memorandum that they have not yet obtained it. And that appears to be the true history of the transaction.

I am sorry that I am occupying so much of the valuable time of this Court; but it is extremely material when points of evidence, which to many of us, to me at least, have appeared perfectly settled, are thrown into doubt by any one, that they should be

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fairly and fully discussed ; and I hope I shall have the concurrence of my brothers in saying, that that time is not ill spent which is employed in sifting matters of this sort.

I do not, however, think it proper to rest wholly upon the principle of those cases to which I have alluded alone, and to consider this document as admissible evidence, only on the ground of its being an exception to the rule of *res inter alios acta*. I rather ground my opinion upon this simple rule, that an instrument of this sort, coming from a custody which gives it authenticity as a genuine document and relating to the subject of inquiry, or points in issue, must be read throughout to the jury, as well as to the judge ; that both must hear its contents, and the whole contents, if they are connected together ; with this main qualification,—that they bear upon the question in issue, and more particularly if such parts of the instrument as are offered in evidence coincide with the nature and the design of the instrument itself, as I say this statement of values does.

I agree perfectly in the guarded terms in which the opinion of the Court was given by the late Chief Baron ; I have not under my eye the very words in which it was delivered, but I know I shall be corrected by the superior accuracy of my Lord Chief Baron who follows me, if I am wrong ; but I give the impression of it on my own mind, as being that the book, or rather the entries contained in it, were evidence, and that all their contents were evidence. But the Court declared that they were to be considered as saying nothing, as to the effect of the application of

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those contents on the points in issue, or as to the weight which they ought to have with the jury. That, according to my apprehension and recollection, was the judgment of the Court.

A written instrument, relating to private contracts or other transactions between individuals, may often contain facts which are evidence against parties and privies, but not against those who have no concern in those contracts or transactions, and whose interests are sought to be affected by it. Instruments of every kind may state, and truly state, facts which have no relation to the point in issue, and are therefore not evidence, or if they have relation to the point in issue, may be excluded by rule of law. Thus, the confession of a prisoner is no evidence against his confederate. In all such cases, it is the province of the judge to tell the jury they must not hear the instrument speak; but the distinction, according to my apprehension, is obvious between instruments or documents of a private and those of a public nature, when offered to regulate private rights under established and accredited authorities, and to defeat or recognise those rights: and I know no distinction in these cases, between original documents and subsidiary evidence of them; the latter, on proper introductory evidence, are placed on the same footing as the former. Of this kind are those ancient documents, and the memorials of public authorized acts, which ascertain and fix the rights of the Church.

An endowment, or what in ancient times held place of an endowment, is, I have always understood

stood till within these last few years, indeed, perhaps I may say until the day of this discussion, to be an instrument of this public nature. Of the many endowments or substitutes for them, which I have heard read, and of which I have read as having been received in evidence, I never heard any objection taken to receiving any part of their contents, or any such distinction taken, as that which is now insisted on.

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I will not compare the credit of an endowment, or this assignment of the abbey, which I call an endowment, with Pope *Nicholas's* taxation, which was made with a view to foreign profits ; nor with the ecclesiastical or parliamentary surveys, made with a less exceptionable object ; nor with the ministers accounts, conventional leases, or leases of corn of rectories, and tithes, the revenues of dissolved monasteries ; nor with inquisitions *post mortem*, nor instruments of that nature, which we have often received to be read without objection. In all those cases the land-owner, and in some the vicar, might very properly say, how am I to be affected by what the agent of the pope, or the minister of the Crown, may chuse to settle as the value of the tithes, or the portions in which they are to be paid ? I admit that endowments do not state the value of the vicars portions in general, but that is because that is previously ascertained upon oath ; but all the endowments state that an inquiry has been made to that effect, and they state that as the ground-work of the endowment. And I protest, for one, that if an endowment, of which I do not affect to have seen any instance, instead of stating that the bishop had

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been satisfied by the oaths of twelve men as to the values, had stated the report of those twelve men, that the fleece consisted of so much, and so on, I do not see how it would be possible to reject the evidence of value as there mentioned ; but if the instrument be of the nature of a proposed plan, or particular of an endowment, the values become not only pertinent, but the most material part of the instrument.

The argument would be conclusive of the admissibility of this evidence, but for a possible mistake which I may have made in the construction I have put upon the instrument before us. A great many endowments might very properly contain values ; and supposing the instrument to be such as we found in the case of *Kennicott v. Watson*, which came before us lately *, where a pension was payable by the vicar as long as his benefice produced a given sum ; and if it should fall short of that given sum, then the pension was to be suspended. Now if the payment of that pension was to depend upon the value of the vicarage, that value would be a necessary part of the endowment ; and can any person say, that the value so expressed in an endowment of that nature, would not be perfectly competent evidence to show what the value of the vicarage was at that time of day. Not only is the distinction new to me, but in all cases whatsoever the vicar looks to the endowment as the foundation of his rights. Perception and long enjoyment is the

* See that document, ante, p. 252.

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vicar's common law proof; and when his endowment is established by proof of such perception which bespeaks an origin by endowment, I have always considered that, in favour of the vicar or of the rector, it was that which regulated the rights of all parties, and that it was tantamount to the highest authority: and I have never to this moment heard it said, that an endowment was evidence only as between the patron and the vicar, in matters of doubt on a question of endowment. It does not bind the rector and the vicar alone, but it also binds the land-owners. Can any man say, that if there had been an endowment of glebe, or of an interest in a wood, the lord could dispute the endowment because he was not a party. Third persons are perpetually concluded by endowments; as when a man claims an interest in a portion of tithes, would not the endowment, endowing the vicar of that portion of tithe, be evidence against him? It is very often for the interest of a man to say, I pay a hay-penny, and I pay it for agistment as well as for hay; the vicar produces an endowment, by which he appears to have been endowed of agistment: would not the endowment of agistment, *eo nomine*, conclude him? I presume that that could not be very much a question, but I put it by way of illustration. Then it may be said, that if this is the case, why did not the Court reserve the effect, and the application of the contents of this instrument, to be considered by the Judge who tried the cause. The reason was this; the facts which the endowment proved, or its contents, might by possibility have no relevance or application to the question at issue. A

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fact may be provable by undoubted evidence ; but in order to make it evidence to the point in question, it must be through a proper medium of proof. Suppose that this payment of 5*l.* 3*s.* 4*d.* had stood alone, and was not made common cause with all the other moduses in the parish, the fact that all the other farms in the parish paid tithes in kind, would have been no evidence, probably, that *Bagber Farm* paid tithes in kind also at that time ; because though other farms paid tithe, *non sequitur*, that *Bagber Farm* did. The meaning of the decision I take to be this ; the entries in the book, coming from a place where it would be naturally preserved, may be read, their contents must be taken to be authentic, and there is no giving validity to one part of the contents more than another ; but whether they bear upon the question, whether the facts which they prove from a medium of just reasoning, from which a conclusion can be drawn to affect the point in question, must be left to the Judge. Circumstanced as this case is, it might have been a very nice question, whether the fact of payment of tithe in kind in the other parts of the parish, would have been competent evidence. That question, however, has been very properly avoided upon the present occasion ; but the fact that the estimated value of the vicar's endowment did not exceed 8*l.* or 9*l.* exclusive of the manse and glebe, &c. for I do not make them amount to more ; the fact that the estimated value of the endowment, estimated as I say, for the essential purpose of the instrument did not exceed 8*l.* or 9*l.* is so material a fact, that the counsel for the plaintiff in this cause felt that it must be excluded,

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or

or that it would be well nigh fatal to their case. It is all but conclusive. If rejected, it must be rejected not because it is irrelevant, but because it is most directly to the point, and goes in a great measure to decide the question in the cause. No man can say that these entries do not prove that the abbot had assigned to the vicar his manse, and glebe, and botes, out of the lord's land. It can hardly be said that this is not evidence for him against the proprietors of this wood, and the occupiers of this glebe ; and why not then of the value, without the statement of which, the instrument loses half its import. How can the Court exclude the estimated values, which are part of the very purpose of the instrument, and of every sentence which assign the vicar his tithes? The argument concedes that it is evidence that he has those particular tithes. It has "*Decimam pullorum et porcellorum.*" I do not find that objected to ; but it is contended, that you must strike out the other part of the same sentence, "*quæ valent, 20 d.*" So you may read, "*Decima lactis Casei,*" because that proves only his right to that particular tithe ; but you must not complete the sense, and read "*per annum valet, 20 d.*" That appears to me to be a sort of reasoning, with respect to the exclusion of this or that part of the contents of an instrument of this sort, that I cannot understand.

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Something has been said as to the manner in which this was left to the jury by the Judge, as if the Judge had at one time expressed his opinion that it was no evidence, and had concluded with

saying that the evidence was extremely strong. In that respect, I think something may very well be allowed for the situation of a Judge, in trying a long cause of this sort, and exhausted; something might have struck the ear of those who put down what he said, not perfectly perhaps expressive of that sentiment and that opinion which he really entertained. But if we are to take it that the Judge said at one time that this was no evidence, (if that be a real representation of what came from the Judge,) and at another time, that it was strong evidence, we may consider the Judge as saying, that it could not be treated as conclusive evidence: for though it bears upon the point, and bears to a great degree, it might be, that in estimating those values, the subsisting moduses at that time of day had been overlooked; though it is very strange, if it was the design of the abbey to propound to the bishop a reasonable sum, that they should state the whole tithe as only 9*l.* if one farm produced at that time between 5*l.* and 6*l.* However, it is sufficient to say in this instance, that the learned Judge appears to me to have done very right in declaring, that though not perhaps entirely conclusive, this evidence did go a great way to decide the cause in favour of the vicar; therefore I think that the Judge has done no more than his duty in directing the jury, as to this part of the evidence, as he has done; and upon the whole, I am clearly of opinion that there ought not to be a new trial.

THOMSON, *Chief Baron*.—(Stated the question and the circumstances under which the former new trial

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trial had been granted.)—On the former motion for a new trial, the Court thought that the rate-rolls which had been rejected ought to have been received, and that alone would have been sufficient for a new trial; but they also thought that the book, which had been declared inadmissible because it had not been produced from the proper custody, should be received, because the Marquis of *Bath* was shown to have been sufficiently connected with the abbey, to have made his custody the legitimate possession. The Chief Justice not only so thought, but that the contents were admissible, and bore upon the question at issue, for that formed a considerable part of the objection which had been taken to it, and therefore must have been over-ruled. Yet that opinion of the Court, as to the relevancy of its contents, was expressed with great caution by his Lordship, guarding in a particular manner against their being understood to have decided any thing as to what effect that evidence ought to have on the verdict of the jury.

The cause then went down again, and the defendant on that occasion prevailed on the strength of the evidence of the rejected documents; and now a further investigation is sought to be obtained by the plaintiff, on the ground, that this document ought not to have been received to the extent, and for the purposes, to which it had been then applied. On the former occasion, (at least as I and my brother *Graham* thought, although it seems my brother *Wood* is of opinion that it was not so,) it was held by the Court, that the value of the titheable articles

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enumerated in the paper ought to have been read to the jury as evidence; leaving, however, the degree of credit which it ought to receive when produced, entirely to them. They have decided how far it was entitled to their consideration by their verdict.

It is now contended, that no weight ought to have been given to that part of this document which sets out the value of the tithes payable to the vicar.

Now let us consider in what situation this paper stands as between the parties. It is found in the custody of the rector, that is, of the monastery, who are entitled to every thing which is not granted to the vicar. This, then, is an entry made by the abbey themselves, in which they acknowledge what the vicar is entitled to; and as far as that goes, it is an entry against their own interest. It contains the particulars, and very minutely, as has been observed,

all the articles which the vicar was to possess, as well in land as in tithes: and there is annexed to both, that is, both to the land and to the tithes, a value in the same sentence. It appears to me impossible to make a distinction between the evidence of their giving him the thing, and the value of the thing, which is specified in the same breath which gives the very thing itself. It was material, as has been observed by my brother *Graham*, that the value should be specified; for the license of the bishop for the appropriation, which I have not mentioned before, but which is found in this chartulary, had directed that a vicar should be constituted, and that he should be endowed with not less than ten marks.

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marks. Then it was material for the monastery, in compliance with that direction of the bishop, when they did assign any particular subject of which he should be endowed, to enter the value of those subjects; in doing which, they certainly need not have made an entry of more than was requisite to satisfy the bishop that they had complied with that part of his direction, in having endowed the vicar to that amount.

In all the articles that are mentioned, they are mentioned specifically, as though the tithes were paid in kind through the parish; and there is no mention of any money-payment, and especially of so large a payment as this of 5*l.* 3*s.* 4*d.* existing before that time, in this parish: but this instrument states the value of the tithes then existing, without taking notice of any such modus. Indeed, if any such payment then existed, and they were aware of it, they might have very easily satisfied the injunction of the bishop as to the *quantum* of the endowment, by assigning to the vicar in one article, this which would have been above half of it, and thus have saved themselves the trouble of specifying so many articles. But so it stands upon the evidence now laid before the jury upon the new trial, and from which the jury have drawn their conclusion, that in fact, at that time of day, the modus did not exist.

I will not take up any more time, for it seems to me, that we ought now to be satisfied with what the jury have done, and to allow the credit that they

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they have paid to this book, which has been admitted in evidence. But the case has been greatly strengthened upon the second trial, by the admission of the tithe-rates, as they are called, which were before rejected. The evidence in support of the modus before, went further than the proof of constant payment of this sum by the owner of that farm, but when the tithe-rates were examined, and the evidence relating to them given, it appears that all the parish at the same time were paying sums of money for the same number of years,—that they were included in the same book of rates, and collected with the same notice in the church at a given day. That certainly very much strengthened the evidence which resulted from the chartulary, negating the existence of any such payment.

Upon the whole of this case, therefore, without going more into detail, it appears to me that the evidence was properly received. Indeed the Court have before decided it was admissible ; and I think that on the whole case, the jury cannot be said to have drawn a wrong conclusion in saying that the modus did not exist. Therefore, I am of opinion with my brother *Graham*, and my brother *Richards*, that this order for a new trial should be discharged.

Rule discharged.

IN *February* then next, the appellant presented a petition of appeal against the above order of the Court of Exchequer, so refusing a new trial, praying
that

that that order might be reversed, and that a new trial might be ordered of the said sixth issue, for the following, amongst other reasons ;—subscribed by *Lens* (Serjeant,) *Dauncey*, *Gazelee*, *Casberd*, and *Heald*.

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First, Because the said book called the Chartulary was not sufficiently authenticated by being traced to the proper custody, so as to render the same legal evidence.

Secondly, Because, supposing the said book to have been sufficiently authenticated, the entries therein are not of such a nature as to be legally receivable in evidence. They do not purport to be an original instrument, nor a copy of an original instrument, nor a substitute capable of being received in the absence of an original instrument ; nor do they profess to be an extract of any description, or an original declaration proceeding from any particular party. They are entries evidently referring to some prospective act, yet so indefinite and uncertain in their nature, as to be incapable of any specific title or denomination ; and if it were possible to contend that they might be construed as an original endowment, which it is submitted is impossible, it is obvious that the instrument would not be derived from the proper custody.

Thirdly, Because, supposing the said book to have been duly authenticated, and the entries therein, from their nature, to be legally admissible in evidence, such entries are not appropriate evidence
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with reference to the issue on the record ; for the endowment of the vicarage, so far from being a subject of dispute, or constituting a necessary part of the respondent's proofs, is admitted by the very nature of the appellant's own case ; and as to that which is the only point in issue, namely, the mode in which tithes are payable annually for *Bagber* Farm, those entries cannot be received in evidence, although as to another point, if it were a matter in controversy, they might be considered as legal proof.

Lastly, Because those entries are not legal evidence as between the parties upon the present record ; for they cannot be considered in the light of a public act, in which the world at large may be supposed to have borne a part, nor of an act to which the appellant or any former owner of *Bagber* Farm can be construed to have been a party. They seem to have been the unauthorized act of certain individuals, as against whom it may be conceded such entries would be evidence, but as against the appellant, or in other words, the owner or occupier of *Bagber* Farm, who had no participation or concern in their formation, nor any knowledge whatsoever of their existence, those entries, on the ground of their being *res inter alios acta*, are inadmissible in evidence.

On the part of the respondent, were submitted the following reasons for affirming the decree : subscribed by *Pell* (Serjeant,) *Taunton*, *W. P.* and *Gifford*.

First,

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First, Because the original endowment of this vicarage, if it could have been produced, would have been admissible in evidence, not only for the purpose of establishing the rights of the vicar to particular species of tithes claimed by him, but also for the purpose of raising an inference from its contents, that a money-payment similar to that now contended for, did not exist at the date of the endowment; and under the circumstances of this case, the entries in question were good secondary evidence of the endowment, and receivable therefore in evidence, in the same manner as the endowment itself would have been.

Secondly, Because the book came out of the custody of the rector of this parish (viz. the abbey of *Glastonbury*,) and since the rector is entitled to every thing not granted to the vicar, an entry made by the rector, acknowledging what the vicar is entitled to, is an entry against his own interest; and therefore, upon the principle of numerous decisions, admissible in evidence against third persons.

Thirdly, Because the entries being, as it is submitted, admissible in evidence upon the grounds before stated, the respondent was entitled to have them read throughout.

Fourthly, But independently of the question upon the admissibility in evidence of the entries from the chartulary, there is another ground upon which (as was observed by Mr. Baron *Richards*, in delivering his judgment) the respondent might, if
necessary,

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necessary, insist that the verdict ought not to be disturbed. An issue of this kind, directed by a Court of Equity, is merely for the purpose of informing and satisfying the conscience of the Court, which is ultimately to form its own decision upon the facts, as well as the law of the case. When, therefore, the finding of a jury upon such an issue is brought under the consideration of the Court, upon the ground that evidence was improperly received at the trial, if it appears, upon a review of the whole case, that the other evidence in the cause was sufficient to have led the jury to the conclusion they have formed, the Court will not send the case to another trial, the result of which ought to be the same ; but, being satisfied that the conclusion the jury have already drawn is right, will act upon it.

In this view of the subject, it would be material to consider the nature of the evidence on the one side and on the other, in the present case, independent of the chartulary.

To establish the existence of an unvarying unalterable payment in lieu of tithes from the year 1194 (the time of legal memory,) the evidence on the part of the appellant consisted merely in proof of the non-render of tithes in kind, in respect of this farm, during the recollection of any living person, and the receipt by the vicars of this parish, since the year 1754, of the sum of 5*l.* 3*s.* 4*d.* annually on *St. Thomas's Day*, in lieu of his tithes.

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From this evidence, unsupported by any reputation in favour of its being a customary and ancient payment, or by any mention of it as a modus or fixed payment in any of the title deeds or muniments of his estate, he seeks to raise the presumption that it had existed for six hundred years.

To repel this inference, proof (now no longer objected to) was given on the part of the respondent, that the payment in question (which was for the small tithes alone) exceeded by much the probable value of the land itself, at various periods about and subsequent to the time of legal memory.—That although the farm in question constituted a small part (not more than a six-and-twentieth) of the whole parish, yet that this payment amounted to more than half of the whole estimated value of the tithes of the vicarage, at different periods within the time of legal memory:—that the non-render of tithes in kind during living memory, and the payment of a regular annual sum in lieu of such tithes, since the year 1754, (from which alone the presumption of its immemoriality was attempted to be raised,) were not circumstances peculiar to *Bagber* Farm; but that on the contrary, all the other farms in the parish, during the whole of the period referred to by the appellant's witnesses, stood precisely in the same situation; uniform payments in respect of all of them having been annually made, in consequence of a general notice to the whole parish:—That they were all collected on the same day, under the same paper, and under the same denomination. In short, that there was no distinction whatever between the payment in question and all the other payments

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payments (one hundred and nine in number) throughout the parish. If, therefore, the payment in question were an immemorial and unalterable one, it followed from the same evidence, that all the others were so likewise; and consequently, that the vicar, in the year 1194, received 68*l.* 17*s.* 6*d.* for his small tithes; when, in the year 1291, the whole vicarage (including the glebe and the other profits) was valued only at 10*l.* a year, and in 1535, the vicarial tithes were valued at 8*l.* 16*s.* 3½*d.* only; a thing wholly incredible. This evidence, therefore, completely destroyed the slight and weak presumption raised on the part of the appellant; and as it irresistibly proved, that the payments throughout the parish could not have been immemorial, and as the payment in respect of the appellant's farm, was not distinguishable from the others, the jury could not have hesitated to draw from thence (without the assistance of the chartulary) the conclusion that the appellant's payment was not a modus or immemorial payment; and consequently, no further satisfaction could be obtained by sending the case to a new investigation, which must, or at least ought to produce the same result.

Sir *Samuel Romilly*, and *Dauncey*, having argued at the bar for the appellant; and

Pell, Serjeant, and *Gifford*, for the respondent.

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Lord *Eldon*, Chancellor, now delivered judgment.—It seems to me, that this is a case in which it is extremely fit that whatever judgment may be

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be given on it, the reasons upon which the House proceeds should, in some measure at least, be stated; the degree or extent to which reasons are stated are measured, as your Lordships know, by the discretion of the House itself, whether it affirms or not. I shall say nothing at this moment as to any proposition, either for affirmance or disaffirmance of the judgment which I shall propose to your Lordships; for, considering the case as one which (however we may dispose of it) calls upon your Lordships to state the grounds upon which we act, because it is certainly a case of very considerable importance with respect to other cases that may arise in the courts, I find it impossible within that space of time which must elapse between the present time and one o'clock, when the Judges are to attend on important business, to address your Lordships so fully as I should wish to do to-day.

My Lords, if the entries in this book have been properly received in evidence, and if the effect of them has been stated to the jury with sufficient accuracy, there is an end of all other questions in this cause; because, I think I may venture to state to your Lordships, that at least I have found no noble Lord in this House who would have any inclination of opinion that this verdict was wrong, if that evidence was properly received. If that book was improperly received, or its effect was not stated with sufficient accuracy to the jury, then other very important points have been submitted at the bar, which deserve to be well considered.

I understand an issue had been granted by the
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Court of Exchequer, in my Lord Chief Baron *Macdonald's* time. And upon the rehearing of the cause, the Court continued of opinion that that issue should be tried; and I consider what has passed in that Court since, first upon the motion for a new trial, which the Court granted, and the second time, upon the motion for a new trial, which has been refused, as stating the opinion, in the first instance, of all the then Judges, and in the last instance, of all the present Judges except Mr. Baron *Richards*, that in this case an issue ought originally to have been directed. Where there has been an appeal against the opinion of the Court, as to granting such an issue, it would be extremely improper, and I think very difficult, in this case, to say that that issue was not granted with propriety originally; and I should certainly feel a great anxiety to abstain from saying any thing on that subject, without looking through the record in the Court of Exchequer, and all the evidence which was given in the cause. But I have no difficulty in saying, and if it be important at this period to say it, I desire it may be understood, that after now about forty years experience in the profession, I take it to be quite clear that a Court of Equity, in cases of this sort, as well as with respect to all cases where matters of fact are in question, has a right itself to determine upon the fact, without the intervention of a jury. I very readily admit that the exercise of its judicial discretion will, in many cases, make it its duty to call for the assistance of the verdict of a jury; but I can never admit that if the evidence which is before a Court of Equity, is satisfactory upon the fact, a Court of Equity is bound to send any

any such case to a jury ; and that is a doctrine which I conceive to be as clear in matters of tithe as it is with respect to any other matter of fact. And I do not hesitate to say, that in the view I have taken of this case, if it had come here originally by appeal, as it regarded the direction of issues, it appears to me that the weight of the evidence, independent of this chartulary, is so much on one side, that at least I should have found myself, for one, under great difficulty in persuading myself to grant an issue ; but issues have been granted ; and, we must now take it, properly granted.

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There is another point of great consequence which has been stated at the bar, and that is this : —It is said, that because an issue has been granted, if evidence has been improperly received, there ought to be a new trial. Now that is a point on which I wish, at least, to reserve myself, provided we do not dispose of this on the first point.

The case of the minor canons of *St. Paul's* was a case that not only received the judgment of the humble individual who now addresses you ; but it was afterwards brough there by appeal, and this House, very well assisted at that time, concurred in this doctrine at least, that where evidence had been improperly rejected upon the trial of an issue, yet, that if,—upon looking at the evidence which was recorded in the Court that directed that issue, and looking at the evidence that had been actually given on the trial,—if the Court of Equity itself was satisfied that, if that evidence which was rejected had been received, and the verdict had been the

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other way, it could not have permitted the verdict to stand:—the refusal of a new trial, in such circumstances, was a refusal according with the proper course of judicial proceeding. In that case of the minor canons of *St. Paul's*, I stated, both in the Court below and in this House, that I thought that no issue ought to have been granted. An issue, however, was granted; and therefore, I thought we ought to consider the issue as properly granted, as there was no appeal against it. It was some evidence that my opinion was not very wrong, that when the issue first came on to be tried, I think before Lord *Kenyon*, or perhaps at the bar of the Court of King's Bench, Lord *Kenyon* disposed of it very speedily, certainly; for he said there was nothing to try. However, another trial was granted, which, one of the learned counsel now at the bar must recollect, was tried at the bar of the Court of Exchequer; and upon that trial, some material evidence was offered, which three of the Judges were of opinion should not be received; Mr. Baron *Graham* was of opinion it ought to be received. The evidence was rejected by the prevalence of opinion; and then a motion was made before me, sitting in the Court of Chancery, for a new trial, because that evidence had been rejected. I declared it then to be my opinion that Mr. Baron *Graham* was right, and that, if I had tried that issue, I should have admitted that evidence; but I also stated, that considering what are the peculiar duties of a Court of Equity, considering what is the particular purpose, and the particular view with which it calls for the assistance of a jury, it appeared to me, that it would be quite a monstrous doctrine to say that, the object being to satisfy

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satisfy the conscience of a Court of Equity, in order to satisfy its conscience, a Court of Equity should direct a new trial, when it saw, upon the effect of all the evidence taken together, that if the verdict was given the other way, its conscience would not only not be satisfied, but would be dissatisfied, and the Court would be unable to confirm it. It seems to follow, then, that if evidence is rejected which ought to be received,—and you will not grant a new trial, because that evidence is rejected,—that you will not grant a new trial, because some particular evidence is received, if, putting that out of the case, you come to the same conclusion, with respect to the satisfaction of the mind of a Court of Equity upon the other evidence which was received, regard being had to all the other evidence in the cause in the Court below. I say simply thus much to-day, because I wish upon these two points to have it at least understood, if my opinion is worth regarding, that it is most indisputably clear, that a Court of Equity may decide tithe causes as well as others, without directing issues. It will, of course, use an anxious and a careful exercise of discretion, in refusing or not refusing issues; but if there prevails anywhere, a notion that it is incumbent upon a Court of Equity trying tithe causes, whenever there is a question of fact, to send the case to the Jury, I must declare that that is a doctrine contradicted by my experience, and the whole administration of the law for a long series of years.

I am anxious also, if we should happen to determine this particular case upon the first point, (that is, if we should happen to be of opinion that the

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book was admissible in evidence, and that its effect has been stated to the jury with sufficient accuracy;) to protect that decision against any inference being attached to it, as if we had decided what a Court of Equity would or would not do if that evidence ought to have been rejected.

Adjourned till the next day, Three o'clock.

13th June.

Lord Redesdale.—(Having very fully stated the case, going minutely through the evidence, both parol and documentary, beginning with the ledger-book or chartulary of *Glastonbury Abbey*, and noticing the various points which had arisen in the course of the proceedings below.)—The objections that were made to the admissibility of this book, were of three descriptions; first, that it did not come out of the proper custody: (that however seemed not to have been pressed upon the last trial;) secondly, that the entries in these books were not evidence of the matters, in proof of which they were proposed to be produced; and thirdly, (if they were evidence of those matters,) that as they were founded on what is commonly called *res inter alios acta*, (that is, that they related to a thing with which the owner of *Bagber Farm* had nothing to do,) they could not be offered in evidence against him.

With respect to the book itself, many observations were made upon it, and particularly as to its containing matter not at all connected with the possessions of the abbey; and there seems to be no doubt that it is the fact, that it does contain matter
not

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not at all connected with the possessions of the abbey; but it does however contain, from about what is now the sixteenth page to a very considerable extent in the book, copies of a variety of instruments, with which in some way or other the abbey might have had concern, and such as are, generally speaking, to be found in all books of this description: for the Monks were in the habit of transcribing into books of this sort all the instruments with which they had any private connection, and also instruments of general public concern; and this I take to be the nature of this book. In all great families in the kingdom who have any thing of a muniment room, they have a book of that description, in which all the ancient writings belonging to the family are transcribed, for the purpose, as far as they may answer that purpose, of observation, and of more easy reference and ready access, than the original; and such, I take it, this book was. In order to make it evidence for a particular purpose, search was made at the Bishop's Register, with the object of ascertaining whether there existed there an endowment of the vicarage, and no such endowment was found.

The book produced, with a view to the case now before your Lordships, contains transcripts or entries of two instruments, if they may be so termed. The first is the ordinance of the bishop and chapter of *Salisbury*, upon the appropriation of the church of *Sturminster Newton* to the abbey of *Glastonbury*. Your Lordships will recollect, that subsequent to the date of this instrument of 1269, in the reign of
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Richard II, it was expressly required by the statute of the 15 *Richard II*, ch. 6, that upon every appropriation there should not only be a temporary vicar, but a proper endowment of the vicarage, ordained by the diocesan. Now that statute I apprehend to have been a statute in affirmance of that which was really the proper and regular practice long before ; and in all the proceedings for the purpose of appropriations, it was always required, unless there was some special reason to the contrary, that there should be a vicar, and that that vicar should be properly endowed ; and it was the duty of the ordinary to take care that that should be done. The instrument, of which the entry referred to purports to be a copy, is the ordination of the bishop and chapter of *Sarum*, upon this appropriation of the church to the abbey of *Glastonbury* ; in which it provides, according to what I apprehend was conceived to be the duty of the ordinary, that there should be a vicarage, which should be of the value, every year, of ten marks, to let, "*quæ valeat annis singulis, ad firmam tradi pro decem marcis ad minus.*" That is a very important part of this instrument, supposing it to be an authentic copy of an authentic instrument ; because the subsequent instrument is in conformity with it, and is also in the book from which this instrument is taken. That which immediately follows is entitled, "*Ordinacio Vicarie de Sturminster.*" It has been observed, that that title was probably not originally in the book, because it is written in a small compass ; and that the copy originally terminated there, and then that the other immediately followed, and that these words,

words, "*Ordinacio Vicarie de Sturminstre*," were afterwards added. But if your Lordships look through the book, you will see that all the titles, almost, are exactly in the same way; however, it does not seem very important whether it was added afterwards or not.

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The entry of the second instrument commences with these words:—" *Porciones ecclesiæ de Stur-
" mynster assignate vicarie ordinande in eadem
" perpetuis temporibus duratur*;" then it expresses the several articles. Upon this it was observed, that this rather imported that it was an assignment of that which was to be given to the vicar, to be named and ordained; and that therefore it was previous to the actual endowment. Now I take it, that is in perfect conformity to the instrument which precedes it; that is, in order to complete that which was required by the former instrument, and to render the appropriation complete; for if the allowance of the appropriation by the bishop, contained a provision that the vicarage should be endowed to a certain extent, and that endowment was not made, the consequence was, that by law, as I take it, the appropriation was void. And therefore, although it has been held in later times that after a lapse of years, where there has been constant enjoyment it will be presumed that all which was to have been done, was rightly done, although, as far as appears, it was not rightly done; yet, I apprehend, that as the laws then stood, as they are to be collected from our law books, if the vicarage was not endowed according to the terms
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of the bishop's ordinance upon the subject, the appropriation was, *ipso facto*, void. It therefore was of the highest importance to the abbey of *Glastonbury*, to preserve the memorial of the ordination, and the form of that which they did in pursuance of the appropriation, in making a provision for the vicar, to show that it corresponded with the terms required by the permission given by the bishop for the appropriation. Now, supposing that these are copies of two authentic instruments, they are copies of two contemporaneous instruments; that is, so far contemporaneous, as that one immediately followed the other, in order to complete the substance of the former. It was essentially necessary that there should be set out the value of the different articles of which the vicarage was to be composed in the second instrument; and that accounts for the difference in this respect, between this which may be considered an endowment, and what is commonly the form of the endowment, because an endowment is usually made by the bishop himself, ordaining what it is that the vicar shall have, or in the instrument by which the bishop allowed of the appropriation. He did not usually require a specific sum to be appropriated to the purpose of the vicar, but simply required that an endowment should be made. That appears to have been the common form, especially after the 15th of *Richard II*, which requires that there shall be, in every license of mortmain for the purpose of such an appropriation, a provision that the vicar shall be competently endowed. Then this instrument, thus following the other, ordains that there shall belong to the vicar a certain house

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house and garden, and certain land and housebote, haybote and firebote, in the wood of the lord, and common of pasture, which the rectors had been used to have, and pasture for sheep and oxen, and the tithes of wool, of the value of 6*s.* 8*d.*; the tithes of lambs, of the value of 12*s.* 6*d.*; the tithes of calves, of the value of 6*s.* 4*d.*; and he was to have also two calves of the flock of the lord, and one from another house; it does not appear what they were for; and he was also to have tithes of some other articles, the values of all which are set out in this instrument, and they amount in the whole to the sum of 5*l.* 15*s.* 8*d.* The other articles that composed the value of the vicarage are, 3*l.* 6*s.* 4*d.* for the glebe and common pasture; 4*l.* 9*s.* 11*d.* for the oblations, mortuaries, purifications, and so on; and then it appears, that fifty-one acres of arable land were set out for the glebe, which glebe is estimated, I think, at 3*l.* 6*s.* 4*d.* The whole of these things taken together, produce 13*l.* 11*s.* 11*d.*; the charges deducted are 3*l.* 19*s.* 5½*d.*; and the net annual value is 9*l.* 12*s.* 5¼*d.*

Now the first question is this: whether this instrument, so produced, or that this copy so produced, ought not to have been admitted in evidence. And then a previous consideration arises, whether, supposing the original had been forthcoming, the original itself would have been evidence. Now it should be observed, that this is not offered in evidence for the purpose of establishing a particular fact, but as evidence to rebut presumption, which the appellant called upon the jury to draw as an inference from the

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the evidence which he produced, of payments from the year 1754, that those payments were immemorial payments. In order to rebut that presumption, the vicar produces evidence to show that these cannot have been immemorial payments, and that the jury ought rather to presume the other way; that is, they must presume from what appears to be, according to reputation, the valuation of the whole living at a certain time, the value of the whole of the vicarage at another time, the value of the whole of the vicarage at a third time, and the value of a particular parcel of land within the same district at another time, that 5*l.* 3*s.* 4*d.* was so infinitely beyond the actual value of the tithes of this particular farm (*Bagber*) in the reign of *Richard* the first, that it was impossible, whatever the jury might presume from the other evidence, that it could be an immemorial payment. That is the nature of the evidence, and according to that which was contended for on the part of the respondent, it seems that the object of it was to prove, adopting the language used constantly in the Court of Exchequer, that this was too rank; because you never can meet directly by instruments, the case of the party setting up a modus, for you never can prove directly what was the value of the several articles in the time of *Richard* the first: it can be done only, therefore, by that which shows what was reputed to be the value of those articles; and I apprehend, that in respect of that which is matter of reputation, its being *res inter alios acta*, does not form any objection to the admissibility of the evidence.

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Now this seems to have been completely admitted in this very case, in respect of other parts of the evidence, for no objection was taken, on the ground of its being *res inter alios acta*, to the taxation of Pope *Nicholas*, which is just as much *res inter alios acta*; it is a thing with which the occupiers of land in this parish had nothing at all to do. But that taxation is evidence of this,—of the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate the living.

So as to the sum paid in the reign of *Hen. VIII.* it is proved by exactly the same thing, (the Survey) which is equally *res inter alios acta*, but that has constantly been admitted for the purpose of showing what was the value of the whole of the rectory or vicarage at the time of that survey; not for the purpose of showing precisely what was the value, but what was the sum which the person who made that estimate consented to adopt as the value, and therefore, as bearing a proportion to the real value, from which a jury might fairly draw an inference, what was the whole amount.

The same may be said of the inquisition on the writ of *ad quod damnum*, in the 37th *Edward III.*, which relates to other lands, and lands with which the occupier of *Bagber Farm* had no concern, to which he was no party. It was *res inter alios acta*; but it was admitted as evidence, that at that time the reputation was, that the value of so many acres of land was so much; in that district; and from that evidence the

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the jury were called upon to draw their inference. And that applies to this proposition: Supposing the original instruments, of which copies are said to be contained in this book, could have been produced, I take it they would have stood exactly upon the same footing as the taxation of Pope *Nicholas*, as the inquisition on the writ of *ad quod damnum*, as the survey of *Henry VIII*, or a variety of other evidence.

If old leases could have been produced of lands in this parish, not of *Bagber Farm* only, but of other lands in the parish, from which the general value of land could be fairly drawn as an inference by the jury, that would be evidence properly submitted to the jury upon that subject; because it is evidence of what is matter necessarily of reputation, upon which we can bring no precise proof, but which is to be left to the jury as matter of presumption, to rebut the presumption insisted upon by the other party for the purpose of inducing the jury to infer from the constant payment from 1754, of this same sum of money, that it was a payment by way of *modus*, which had existed before the time of memory.

This being the view which I take of the subject, the only question then is,—Is this book evidence of these two instruments, produced as it is? Certainly, if the originals could be produced, it would not be evidence, because it would not be the best evidence which could be had; but search having been made, the originals have

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have not been found; and as has been very justly observed by the greatest authority, if we are, because original instruments cannot be found, to shut our eyes to evidence of an inferior description, we shall do constant injustice. Where a record is lost from accidental injuries, from the destruction time produces, from embezzlement, from the carelessness or inattention of persons having had the possession of it, or from various other circumstances, so that it cannot be found, (and we know that in a variety of cases evidence of the titles of persons is incapable of being produced,) an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shown.

The next question then is, whether this is that best evidence next to the production of the particular instrument. I take it to be clearly the next best evidence: perhaps evidence still less weighty or conclusive, if no better could have been produced would have been admitted, and might have been sufficient; but this is clearly the next best evidence to the production of the instrument itself, or the production of the entry of such instrument in the register of the bishop, where search has been made and no such thing can be found.

What is this evidence? These two instruments are copied by persons, probably some of the monks of the abbey of *Glastonbury*, amongst the ancient muniments and instruments concerning their abbey.

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Why are they copied? they are copied because it is important to the abbey to preseve them. We ought to presume they are faithfully copied, for the same reason; there is nothing to induce an unfaithful transcript of them, and there is therefore every reason to presume them faithful transcripts; they are found in a situation in which such transcripts are likely to be kept, and where being found, they must be considered as of weight and authority. The second instrument is important, highly important, to the abbey itself. The first instrument is important to them, as it allowed of an appropriation, and contained the express provision that that appropriation should be followed by an endowment to a certain specified extent. It was important to them to preserve evidence that they had made an endowment to that extent; for it was by having made an endowment to that extent, that the impropriation was good, and not void. Then it was important to them that the statement, with respect to these values, should be correct, and particularly that they should state them high enough, because they were to make an endowment to the amount of ten marks at least; and being to make an endowment of that amount, is it to be credited that if one comparatively little farm, this farm of 150 acres in *Bagber*, paid nearly as much at that time when this endowment was made, as the sum at which they valued all those tithes, that that circumstance should not have been stated in this instrument, and that the tithes of the whole parish would be valued at the sum at which they are stated here, which is very little more than this one farm, and certainly not so much

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much as the receipts for *Joyces's* land amounted to, for they are 7*l.* odd, putting all the rest out of the question? It is therefore, in my mind, decisive that it is properly evidence, and that it is conclusive evidence upon the subject. There is another thing which results from this evidence, which is this, that if you take the first instrument, which is the bishop's license for the appropriation, it is clear from that that the appropriation is within the time of legal memory. The form of the issue is, that for time immemorial this had been paid to the vicar. Now certainly, in the manner in which questions of this kind are tried before a jury for the information of the conscience of a Court of Equity, that circumstance ought not to prejudice the appellant, and therefore it ought to have been indorsed upon the *postea*, supposing the jury had found for the appellant; that is, it ought to have been indorsed upon the *postea*, that although this was an issue to try whether this had been immemorially paid to the vicar, the vicarage was founded within the time of memory, and therefore it could not have been immemorially paid to the vicar, yet that it was an immemorial payment; it might be to the rector, but not to the vicar. But in this instrument, by which the particulars of these tithes are allotted to the vicar, no notice whatsoever being taken of this payment, it is impossible to suppose that it could have been actually a payment made to the rector, that is, to the abbot and convent enjoying the rectory; it is a thing which they were not in the receipt of, because if they had been in the receipt of it, it must have been specified as a separate and distinct article;

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in consequence of its considerable amount in reference to the whole of what they were supposed to have.

It strikes me, that there can be no doubt that these two instruments, taken together, would of themselves have been important evidence, capable of being received for the purpose for which they were offered, if they had been originals; and that as the originals could not be found, this was the best evidence, under the circumstances of this case, that could be offered, and that therefore they were properly received in evidence upon this subject.

It was objected, that there was an observation made by the Judge which might have the effect of misleading the jury, namely, that the second instrument was contemporaneous with the endowment. I really think that that (even supposing the ground upon which the objection was made had been more substantial,) was little more than cavilling about words, because what does a judge mean by contemporaneous? the jury would not necessarily understand him to mean exactly at the same moment, but that it was an instrument of about the same time: but I apprehend, that really if the expression was to be taken critically, contemporaneous would be a true description of it; for it is an instrument which, in its form, seems to import that it preceded the actual endowment of a vicar, as, in the terms of it, it purports to be a provision for a vicar to be ordained; and the observations made on the part of the appellant, on those words, make directly the other way,
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and show that a second instrument was made, and that, upon that second instrument, the vicar was endowed; and it is observable, that the nomination of the vicar was, by the terms of the appropriation, in the abbey and convent of *Glastonbury*.

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Another consideration is, supposing there was any real objection to the admission of this particular evidence, what is to be done upon the application for a new trial of this issue. An issue of this description is directed for the purpose of informing the Court upon the subject; and that is clear because it is in the terms of the order directing the issue, directed that any special matter should be indorsed upon the *postea*; the consequence of that is, that you are to consider it not simply as a verdict upon the record, upon which verdict judgment is to be pronounced,—for upon that record no judgment is pronounced,—but you are to consider it as the result of the finding of a jury, satisfying the Court, upon the view they have had of the subject, that they have had a right view of it, taking it in the whole. Now when I look at this case, and see what other evidence was before the jury, and the import of this particular evidence, it does appear to me to be abundantly sufficient to warrant the verdict of the jury; for the jury were called upon to establish this as a *modus*, upon the simple fact of payment, under the circumstances which I have stated, and which are the slightest that ever I remember in a case of this description, because there is no evidence whatsoever of a distinct payment as for a *modus*. The evidence which was brought out upon the cross-

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examination of the witness *Moore*, who proved the payments, demonstrates that exactly the same evidence might be offered for every farm in the parish, to the amount of about 70*l.* a year. That, therefore, was the slightest possible evidence upon which a jury could raise a presumption that these were immemorial payments.

Then, to rebut that presumption, besides the rate paper, there are the taxation of pope *Nicholas*, the writ of *ad quod damnum*, and the Survey, in 26th *Hen. VIII.*; all of which must have been founded upon the grossest error, if that which is contended for by the appellant in this case is really true, that this was an immemorial payment from before the close of the reign of *Richard I.* Then the jury must have drawn from this an inference, that the judgment they might otherwise have given from the fact of long continued payment, was a presumption which they could not conscientiously entertain. If so, the verdict of the jury, as it stands, supposing this to have been improperly admitted in evidence, still was perfectly warranted by the evidence before them; and being so clearly warranted by the evidence before them, the result of that is, that the conscience of the Court of Equity is sufficiently informed upon the subject, and consequently, there is no reason for directing a new trial in this case; therefore, it does seem to me right to affirm the order of the Court of Exchequer, refusing the new trial.

I have gone thus at length into this case, because

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cause it is a case of very considerable importance, with reference to the trial of issues of the same nature. I am perfectly satisfied that the book called the Chartulary was properly received in evidence, under all the circumstances; and I am equally satisfied, that if the evidence was not properly received, the Court have done right in not granting a new trial.

Lord Chancellor.—I hope I shall be able to bring within a very narrow compass what I have to offer to your Lordships attention. This suit was instituted about twelve years ago, and the question before us at this day is, whether a third trial should be granted of the issues directed by the Court of Exchequer, where there have been two former trials; one of which has terminated in a verdict for the appellant, establishing the existence of a modus in this parish, the verdict upon the second trial being found for the respondent, and thereby asserting that no such modus had existed. And although this cause has endured twelve years, yet if your Lordships are of opinion that it has not finally been satisfactorily decided in point of fact, or that there has been any material miscarriage in point of law, regard being had to the nature of this question as a question arising in the course of a cause in a Court of Equity, undoubtedly you must, whatever you may feel about it as to the parties, subject them to the consequences of a further investigation of the subject.

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This was a bill filed by a vicar making a claim of those tithes in kind which are called vicarial, which he asserted he was entitled to under some endowment, either produceable, or the contents of which must be now inferred. My Lords, the defendants in the cause in the Exchequer were twenty in number, and they had this very singular case to support;—for I believe no instance in the history of any parish in this country can be produced, in which the same thing was to be supported;—that all this parish with the exception only of what relates to the corn tithe was covered by moduses, those moduses amounting altogether to between 60*l.* and 70*l.* a year; and that therefore, the vicar of this parish must be considered as having been entitled to moduses for 68*l.* a year, represented as being contracts made for valuable consideration, so long time ago as the time of *Richard I.* and that too excluding corn and grain. So that you are to imagine that the value of the tithes of this parish in the reign of *Richard I.* were such, that tithes, which did not include either the tithable matter called corn, or the tithable matter called grain, appertained to the vicar, in the shape of pecuniary compensation, to the amount of 68*l.* a year. We know what the value of money was at that period, but we must also throw into the scale the probability that the rector was to have the tithe of corn and grain too. To be sure, if there was a vicarial tithe, in the sense in which I use the word, equal to the sum of 68*l.* in the time of *Richard I.* the tithes of corn and grain being also of such value as you may be pleased to attribute to them, in the time of *Richard the first*, I hardly know any

any gentleman who would not have wished to be the subject of ordination to *Sturminster Newton*, I mean at this day, provided these moduses cannot stand; for what must the value of the tithes be now?

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It was stated on the part of the appellants in the Court of Exchequer, that from time of which the memory of man is not to the contrary, they or their predecessors had paid these moduses, and that therefore the vicar had no claim to tithes in kind. My Lords, I take it from the judges report to have been proved, in the Court of Exchequer, that as far as memory goes, the vicarial tithes had not been paid *qua* tithes, but that there had been money-payments made throughout the whole of the parish, not forgetting the distinction between the Meads and the other parts of the parish; and the matter appears to rest, on the part of the defendant, with this evidence of non-payment of tithe in kind for that period. There was produced in the Court of Exchequer the paper, which Mr. Justice *Chambre* thought proper to reject when it was offered in evidence on the first trial, called a Rate Paper; and it has been stated to us from the bar, that the use made of that rate-paper, in the Court of Exchequer, was not such as has been made upon the second trial in the country, namely, not to deduct from the whole of the contents of this rate-paper, what might be inferred legally as to any particular farm mentioned, with reference to the rate paid for that farm; but that, *reddendo singula singulis*, they stated it to be a paper which had this peculiar species of application; that what was mentioned as to farm A, had a distinct application to farm A; and

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and what was mentioned as to farm B, had relation to farm B. only, and so on. Now though it appears to me to be a most important paper, and that it is evidence, yet I consider it so with quite a different application: For as the decision in the case of the *Minor Canons of Saint Paul's* was, that the rate-paper by which the collection was made, which in that case was a most material paper, was taken as evidence with this view, that it must be contended that the payments there mentioned were all customary payments, or that it might rationally be inferred that none of them were so, (for they must all be one or the other;) so this paper appears to me not only to have been admissible evidence, but most extremely important evidence on this issue when applied in the same way.

Then, supposing that that evidence, with Pope *Nicholas's* taxation, the inquisition on the writ of *ad quod damnum*, and the Ecclesiastical Survey, was all that had been before the Court, I cannot help entertaining the difficulty which I expressed yesterday, (but which must have no influence upon your Lordships decision upon this matter, further than I can apply it upon another principle;) for I think it is matter of surprise that an issue should have been directed, because, independent of the evidence of the chartulary, there appears to have been demonstrative evidence that these payments could not be moduses; and I take the liberty to repeat, (because I should be extremely sorry that there should be introduced into a Court of Equity, by any one, such a notion as that because they have
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before them the trial of a fact which *may* be tried by a jury, therefore it *shall* be tried by a jury,) that that is not the principle upon which Courts of Equity have ever proceeded. These issues however were directed, and they went down to trial. On that occasion Mr. Justice *Chambre* was of opinion that this rate-paper, which I think so clearly admissible, and so highly important, was not receivable; he was also of opinion, that the reeves accounts, which I lay out of the question, were not receivable; and he was also of opinion, that that which I call the Chartulary ought not to be received. A motion was made for a new trial, (the Court, it should be observed, has been repeatedly changed in its constituent members while the cause was pending,) and they were of opinion that the chartulary and the rate-paper were evidence. There appears to be some difference of conception at the bar as to what was the extent of their opinion, as whether the chartulary was admissible only as evidence, or whether, when admitted, it was to have any effect upon the cause. I can only say, that if I had been sitting in a Court of Equity, and thought the evidence competent, but that it would have no effect, I should not have thought of sending it to a new trial, for the book to be produced to the jury, and then for the judge to tell them to shut it up, and to place themselves in the same situation as to the inferences to be drawn from it, as if they had never seen it. I must therefore take it, that the majority of the Court were of opinion (with whom I also agree,) not only that it was competent evidence, but that it was to have some effect; though they said, and with great propriety,

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propriety, that they would not anticipate the effect of it upon the minds of the jury, for that must depend upon the nature and operation of all the evidence taken together.

Then they went down to trial again, and there is now a verdict establishing, as far as any verdict can establish it, that these payments are not moduses; and let it be recollected, this was a suit instituted for the satisfaction of the conscience of a Court of Equity.

I have already said I may be wrong, but if I am, I shall be corrected by your Lordships: but I am at present clearly of opinion, that if the evidence had been before me without that book, I would have directed no issue whatever upon this case; for I think the evidence completely satisfactory, that this could not be a money-payment as old as the time of *Richard I.* It is not, however, necessary for me to discuss that, nor is it necessary for me to say much upon the last point, with which the noble and learned lord concluded. My Lords, if I were compelled by the principles on which, under the sanction of my oath, I act, to admit that where a verdict has been obtained on an issue directed by a Court of Equity, that it is, of course, that that Court of Equity is either to direct or to refuse a new trial, by reason of a miscarriage in the trial in the Court below, I should be very sorry for it; but I must take the liberty of saying, in the presence of gentlemen now at the other side of the bar of this House, and I am sure they will allow me to say, I speak in
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their hearing with the highest respect for them, but I say it in consequence of having often seen it—that the object of these issues sent out of Equity is very frequently misunderstood, because the learned counsel sometimes proceed, (or at least they used to proceed,)—and that is a thing which ought to be corrected,—to get a verdict on these issues just as they would in an ordinary case at *Nisi Prius*; and they seem to think, that that mode of settling a matter at *Nisi Prius* is to satisfy the conscience of a Judge in Equity. We have therefore had some great miscarriages on the subject of appeals on issues lately; and it appears to be important to consider the principles on which they are tried. Thus, when in cases of wills, (a subject often of the highest importance,) we send an issue of *devisavit vel non*, (and a Court of Equity will not, generally speaking, unless it is desired, direct all the witnesses to be examined,) the way in which it is tried is not for the plaintiff to call all the three subscribing witnesses, without whom the Court of Equity cannot establish a will, but to call some one witness to prove the signature and due attestation; then he leaves it to the defendant to make the other two the defendant's witnesses, and we know for what reason that is done at *Nisi Prius*; then, when it comes back to the Court of Equity, it is objected that that will not do, for that a verdict obtained on the testimony of one witness, will not be more conclusive than if we had in Equity established the will upon the evidence of one witness on paper; and therefore, it is contended, it must be tried over again. And that plainly shows the distinction between the cases.

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cases.—What I mean to deduce from this is, that where an issue is directed from a Court of Equity, it proceeds upon different principles and different reasons, and leads to different conclusions, from those which are the result of mere actions to be tried between man and man.

I just referred to the case of the *Minor Canons of St. Paul's*, to which I must advert again. That case was tried at the bar of the Court of Exchequer, having been tried in the Court of King's Bench before. There was material evidence offered on that trial, which three of the judges were of opinion ought not to be received; Mr. Baron *Graham* was of opinion that the evidence ought to have been received, and in consequence of his differing from the other judges, they moved the Court of Chancery, in which I at that time presided, for a new trial. My Lords, I thought myself at liberty to look at the whole case from the beginning to the end, and as the object was to satisfy the conscience of a Court of Equity, to see whether it ought, with reference to that object, to have made any difference if that evidence had been received, (for it would be an extraordinary thing to say, you shall take a verdict against what you consider evidence best calculated to satisfy your conscience,) I declared my opinion to be, that Mr. Baron *Graham* was right, and that the three judges were wrong; and I further said, that if that evidence had been received, and if the jury had come to any other conclusion, with that evidence before them, than that to which upon the exclusion of that evidence they did come, I should

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have ordered a new trial ; and inasmuch as that was my opinion, if such had been the case, it followed of necessity that I ought not to grant a new trial merely because that evidence had been rejected. Now to such a decision, taking it as my own, no man living can attribute less of authority and weight than I do ; but I have the satisfaction of knowing that that was appealed from to this House, and that it was considered upon those principles, in this House, to have been correct. If your Lordships will turn to the printed cases, you will see that that was one of the reasons given for applying for a new trial, and this House determined, that as it was an issue out of the Court of Chancery, the opinion was not founded upon any error that would entitle the applicant to a new trial.

Then, putting the present judgment more distinctly upon another ground ;—however difficult it might be found for your Lordships, where evidence is rejected which ought to have been received, nevertheless to refuse a new trial, which perhaps you hardly would in the case of individuals, where it was not merely to satisfy the conscience of the Court, it would be more difficult for you (when that is the sole object) where you are completely satisfied, upon all the evidence properly admitted by the judge and properly received by the jury, that the verdict ought to have been the same, although there is some evidence admitted by the judge and attended to by the jury which, strictly speaking, by law ought not to have been admitted by the judge, or attended to by the jury, to draw such a distinction as to say that
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you ought to grant a new trial; and if therefore this case places me in circumstances in which it would become me to give an opinion upon it, I have no manner of difficulty in saying it is my opinion, at least, that the rest of the evidence is so completely satisfactory that I should not advise your Lordships to grant a new trial.

The next question is, whether the evidence afforded by the entries has been properly received. It is first said that this paper, even if it was an endowment, ought not to have been received. Is, indeed, an endowment not to be received in such a case as this? My Lords, when the objection is, how can a particular payment, attending to the comparative magnitude of it, be an immemorial payment, a payment from the time of *Richard I.* by what evidence are you to negative such a presumption as that, but by this species of evidence? I beg leave to say, that it clearly proves that it is impossible there can have been taken from the time of *Richard I.* so much for the tithe of lands, when it is shown that the lands themselves were not of the value which it is now said that the one-tenth then was. How are you to get at that, but by the general value of land in the neighbourhood; and on what principle is it that we every day admit inquiries, and Pope *Nicholas's* taxation, and parliamentary surveys?—We admit them for the purpose of showing, by the only evidence by which it is in our power to show it, that the thing insisted upon by the man who sets up a *modus*, in its nature cannot be, because the nature of property in general was such, that it is quite impossible that that should

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should be paid as a composition for the tenth of the value in the time of *Richard I*, which is shown, by a sort of general evidence, to have been at that time more than the amount in value of the whole put together. When, therefore, you come to look at what this paper proves with respect to the amount of the value of the tithes of the whole parish, and when you come to look at what these documents, taking them altogether, prove with respect to the value of what was supposed to belong to the vicar, it is quite impossible, in my opinion, to say that the legitimate inference from the whole is, that this could be a *modus*.

Then as to the custody of the book, I think that is unquestionable, and indeed that has not now been argued. It is such a custody as makes it admissible, because it is in the hands of a person who represents, at least to this purpose, the Abbey of *Glastonbury*. And I really do not trouble myself with the question which has been made as to whether it is contemporaneous, I mean in the strict sense of the word contemporaneous, that is, drawn up at the same time, or inserted in that book at the same time, or not; for no man can look at the book who knows any thing of such documents, without seeing that it is a transcript, in the regular order, into this chartulary, belonging to the Abbey of *Glastonbury*; and being so, it is within the scope of the principles deducible from all the authorities, and therefore it does appear to me not only to be admissible evidence, but to be evidence intimately connected with all the rest. When you come to compare the con-

1816.

BULLEN
v.
MICHEL.

tents of this paper with the other papers produced, you will find the result of the whole extremely cogent, and extremely important. Upon that ground alone, this new trial might have been refused, and I should not have said so much upon the other parts of the case, if it did not appear to me, from some views in which this case has been put in argument, that there might be considerable danger if we permitted, in this House, such erroneous notions to prevail with respect to the functions of a Court of Equity, and the grounds upon which new trials of issues are or are not to be granted, or withheld, in that Court; at least taking care that this decision shall not be supposed to be put upon the point of evidence only.

My Lords, upon these grounds I am clearly of opinion, that this new trial ought not to be granted.

Judgment affirmed.

APPENDIX.

APPENDIX.

APPENDIX referred to in p. 403.

*Extracts from the general Ecclesiastical Survey,
introductory of the Chartulary.*

Anno R. R. Henrici viij^{ti} xxvij^{to}. Et tempe Dñi
Riçi Whityng nūc Abb̄tis iſm.

Monas̄tiū Glastoñ.

DECLARAC̄O annui et integri valoris tam oīm Terr̄
et Teñtoz ac aī possessionū tempaliū q^m Exit^{us} oīm
spuat eidm Monas̄tiū spectañ viz. ut taxat^{us} fueſt et
exāiat^{us} p Revendū in Xpō p̄rem et Dñm Joñem
Clerke Ep̄m Bathoñ et Wellen et Wifm Sto'ton
Militem cū aī Com̄missionar̄ Dñi Reḡ ut sup^a et put
nfer^a pleni⁹ liquet

WALTON valet in

Redd tam liboz tenenč q^m cust^{us} xxxiiij^{li} ij^{li} iiij^{li} oſ
ſr̄m t̄r̄ dñi ix^{li} iiij^{li} iiij^{li} oſ ult^a xvj^{li} viij^{li} p feod̄
Johis Dragon Bathi iſm. Sic nūc clare - xlj

Pquis Cur̄ & aī casuat iſm cū lxxv^{li} vj^{li} de vendiç
bosç iiij^{li} viij^{li} viij^{li}. Fin t̄r iſm - - - C^a

WILTS.—DEVERELL LANGBRIDGE valet in

Redd t^m liboz tenenč q^m cust^{us} p a^m ult^a iiij^{li} iiij^{li} oſ
solut^{us} Ep̄o Saḡ p Sinod̄ xiiij^{li} iiij^{li} solut^{us} eidm Ep̄o
ut al pençoe iiij^{li} iiij^{li} sol^{us} Decano et Capit̄lo Saḡ ut

de al^o xv. viij^a ob solut' Arch^o Sa^o ut de p^ooibz
xx^a p feod Johis Bowser A^o Se^oli i^om et xiiij^a iiiij^a p
feod Witli Brice Bathi i^om. Sic clare - lxiiij^a xvj^a q̄.

Pquis Cu^r et al casuat xxix^a v^a. Fin terr
i^om l^a. - - - - - lxxix^a v^a.

STURMYSTER PERSONAT' valet in

Decis p^odiat & al Exit' infra Rectoriam i^om p
anū x^o ij.

APPENDIX referred to in p. 403.

*Copy of the Entries of the Appropriation and
Endowment contained in the Chartulary of the
Abbey of Glastonbury, remaining in the custody
of the Marquis of Bath.*

Nywton.

ORDINACIO Dñi Epⁱ et capituli Sa^o super
donacionē et appropriacionē Eccl^e de Nywtone et
Sturminster :

WALTERUS miseracione divina Sa^o Ep^s Reli^g viris
Abbtⁱ et Conventui Moⁿ Glas^t ordiⁱ sti Benedicti
Bathoⁿ et Welleⁿ Dio^c salutem in Dño. Multo^r
corda feliciter illustravit ideoq^{ue} celari non potuit grā
quæ vobis divinitus est infusa dudum enim diversis
adversitatibus afflicti ac per eas æris alieni fuistis et
estis onere pregravati succedenteq^{ue} tempo^r intem-
perie nec a tramite religionis aliquatenus declinastis
nec hospitalitatis munificenciam in aliquo restrinx-
istis s^{ed} divina potius quam humana providenciā
passim omni^bs ultra quam vestræ suppetere^{nt}
facultates

facultates pretenditis opera caritatis volentes igitur sicut et velle tenemur ad hoc anelare ut ea de cetero facilius et felicius prosequi valeatis de consensu venerabiliū viroꝝ dilectoꝝ in Xto filioꝝ dnoꝝ decani et capituli nri Sarum fructus et proventus universos pertinentes ad Eccliam de Nywtoñ Sturmynster nre dioč in qua jus hē⁹ patronatus et quam cū omniū suis pertin⁹ ordinacioni et disposicioni nre totaliter submisistis ordinamus disponimus et vobis ac per vos monasterio vꝛo concedimus ad hospitalitatem et elemosinæ vꝛæ sustentacionem in usus vꝛos perpetuis temporibꝫ convertendos plenaria potestate reservata nobis et successoribus nris constituendi et ordinandi in eadem ecclia vicariā ijdoneā quæ valeat annis singulis ad firmam tradi pro decem marcis ad minus ad qū tū quosciens eam vacare contigit ad vos pertinebit ejusdem pꝛesentacio. Vicarius autem qui pro tempore fuerit in eadem omnia onera ordinaria debi⁹ et consueta ad ipsam eccliam pertinencia sustinebit in perpetuum extraordinariis inter Abbe^m et Conventū et ipm vicariū pro rata porcionum dividēdis per hanc autem ordinacionem seu concessionem nram n^l juꝛ vobis intendimus attribuere per quod eccliam de Marnhulle quam separato juꝛ parochialem eē novimus assequi valeatis vel aliquatenus vindicare de predictorū vero decani et capituli nri consensu volumus ordinamus et concedimus quod ipsius ecclie de Nywtoñ Sturmynstꝛ Rector qui nūc est cedente vel decedente fructuum et proventuū ipꝛor possessionem apprehendere valeatis nro vel successorum nrorum iterato consensu minime requisito. In cujus rei fidem et testimoniū

ñrm et predictor Decani et capituli sigilla præsenti-
 bus sunt appensa. Salvis in omnibz in ecclia de
 Nywtoñ Sturmynstř supradicta ñra et successor
 ñror et ecclie Sarum jurisdictione autoritate dignitate
 et consuetudine. Dať apud Remsbuř 8° id̃s Maij
 dno gra M° CC° LXIX° Pontifič nostri anno sexto.

Ordinacio Vicarie de Sturminstre.

Porciones ecclesie de Sturmynstre assignate
 vicarie ordinande in eadem perpetuis temporibus
 duratur mansum cum gardino et valet annuatĩ dĩ
 marč tota arabit pertinsens ad dictam ecclia IX acř
 except scilicet III acř in crosta juxta mansum ecclie
 et IIII° infra clausũ quod vocatur lacombe juř curia
 Dni & II acř juxta boscũ ecclie et valet dicta terra
 assignata vicarie per añ XII sol. Item VI acř pti
 et valent per annum IX sol. cũ redd et terra de
 Colbeř et baggeber et valet per añ XII s. VIII^d
 husbote heybote et furbote in bosco dñi et valet per
 añ XX sol pastur de hamede et Estacr vař per
 añ III^{mo} churchesch? bli & vař per añ XVIII^o IIII^d
 churchesceth Galliñ vař per añ II^{mo} X^d. Decima
 lanæ vař per añ VI^s VIII^d Decima agnor vař per
 añ XII^s VI^d. Decima vituloř VI^s IIII^d. Et pta
 habet II vitulos per añ de curia dñi et unũ de alia
 domo et vař III^s deciam pulloř et porcelloř quæ vař
 XX^d deciam ovoř vař X^d. Deciam aucař IIII^s obla-
 cionũ III festoř principaliũ XXXIII^s IIII^d. Deciam
 feni except decia de dñco abbis XLIII^s. Decia lacř
 et cař per añ vař XX^d decia lini vař per añ XVI^s.
 Mortuar et oblaciones řone descend X^s. Oblacio
 cere

cere et requeste VII^r IIII^d. Oblações cum pane
 bñdto VII^r VII^d. Purificações II^r. Oblaciones et
 decie mercatorū IIII^r VI^d. Decima gardinoꝝ et colū-
 baꝝ III^r. Decia molend sc̃t̃z Rob̃ti Molendinaꝝ VI^r.
 cū piscatuꝝ. Decia molend d̃ti mauri II^r. Joh̃is
 frond̃ XII^r. Item cōis pastuꝝ quam rectores dictæ
 ec̃cliæ consueverunt h̃rē ita tamen quod non comū-
 nicet in d̃nicis et separaꝝ pastuꝝ boscoꝝ prator̃ et
 pasturarum dictorum ab̃bis et convent̃ q̃ non æstiatur
 pastura ad lx bident̃ XII^d. Pastura ad IIII boves
 cum bobz d̃ni II^r. Item in campo boriali XXVI ac̃
 d̃i terræ arabit̃ una perticata in campo orientali
 XXV ac̃ terꝝ arabit̃ p̃t̃ ac̃ VI^d et debet preciū
 singulæ ac̃ræ dimidiā et sic valebit terra singulis
 annis vicario XIII^r. II^d. q^a. Oñia incumbeñt sunt
 ista procuꝝo arch̃i VII^r. IIII^d. ob̃. q^a. Redd̃ naꝝ
 Paschæ et Peñt II^r. Sinodochiū XX. II^d. ob̃.
 Cathedraticū XVIII^d. Serviū unius Capellani
 LXXI^r. VIII^d.—Altellagiū id est provenciones ad
 altaꝝ valeꝝ per annū X.

*Copy Taxation or Valor of the year 1291,
 commonly called Pope Nicholas's Taxation;
 remaining in the King's Remembrancer's Office
 in the Court of Exchequer.*

Anno Dni 1291.

ROTULUS taxaçois Bonoꝝ Temporaꝝ reddit
 et proveñt Religioꝝoꝝ personaꝝ
 Archidiacoñ diversis Com̃ in Regnū
 Angliæ fact A^o Dni 1291.

M M 4

Sag

Saz Taxatio Bonoꝝ Spiritualiū et Temporalīū
in Archidiaconatibus Dor̃ et Saz

Archid̃ Dor̃.

Decanatus Schefton.

	Taxatio	Decima
Ecclesia de Stureminstre	XX m ^{rs}	II m ^{rs}
Nyweton - - - -		
Por̃o Prioris de Crane-	VII ^a	VIII ^d . ob.
born in eadem - - -		
Vicař in eadem - - -	XV m ^{rs}	XX ^a .

*Extract of the General Ecclesiastical Survey,
26th Henry VIII. A.D. 1535. Remaining in
the First Fruits Office.*

Dorset̃.

Diõ Sarum.

Decanař de Shastoñ.

Stourmyster Newton psonat^o.

Psonař approp^ař Monastio de Glastoñ in Com̃ }
Soms—n^a hic oñat q^d in oñe Abbis dci } N^a.
Monastij - - - - - }

Stourmyst̃ Newton Vicař.

Will^o Poxwell modo Vicař iñm cū Capella de
Bagbere eidm Vicař anneř.

In Terř Gleba p annū - - - iiij £.
In omiod Decimis - - - vij £ xvj^a ij^d ob.
In oblač t alijs pfič - - - iiij £ vij^a vj^d.

In

In quadm porcōne eidm Vicař p }
 tempe existeñ p Abbem Monastij } iij' iij^d.
 de Glastoñ in Com̃ Som̃s soluť - }

£. s. d.
 xvij. vij. j. ob.

Inde soluť Archidiač Dorš p Sinod }
 t pcur an^u - - - - } x' vij^d.

£. s. d.
 Et remañ - - - xvj. xvj. vj. ob.
 Inde p x^{ma} - - - xxxiiij^s. vijj^d.

Copy Survey of Newton, in Domesday.

A. D. 1086.

Dorsete.

Terra Sčæ Marie Glastingberiensis.

.VIJl. ~~Eccle S Marie Glastingber~~ teñ ~~Newentone~~

T. R. E. geldb̃ pro

XXII. hid. T'ra. ē. XXXV. cař. pter hanc ē
 t'ra. XIIIj. cař in dñio ibi.

q̃ nunq geldau'. Ibi sť XXI. uilt & XVII^J.

bord̃ & X. cotař & XIII. colib̃ti

& XV. serui. Ibi. III. molini redd̃. XL. soť.

& LXVI. ač pti. Silua

.II. leū & dim' lǵ. & una leū lāt. Valuit.

XXX. liḡ. modo. XXV. liḡ.

De t'ra ista hui⁹ ƿ ten' Waleran⁹. VI. hid.

Rogeri⁹ I. hid. Chetel. I. hid.

xī. cař.

Hæ. VIII. hidæ pošš arari^Λ. Valent. VII. liḡ.

cocus

De ead' t'ra ten' Goscelm⁹ de rege. VIII. hid.

Ibi t̃t. II. cař. & II. seruos. & V.

uiltos

uilloſ & VI. bord. cū IIII. cař. & moliň.
 redd. III. ſol. & IX. deň. & XVI. ačſ pti.
 Silua dimidť leũ lǵ. & una q lať. Valuit &
 uať. IIII. liť.

*Then follow the Writ Ad quod damnum, 37th
 Edward III. A. D. 1363; and Inquisition there-
 upon :*

The Tithe Rates :

*And Receipts for the Money-payment, from the
 year 1766 down to 1792.*

MEMORANDA.

HILARY TERM,—56 GEO. III.

DURING the last *Michaelmas* vacation, Sir *Alan Chambre*, Knight, resigned his office of one of His Majesty's Justices of the Court of Common Pleas.

In the same vacation, *James Allan Park*, of Lincoln's-Inn, Esq. one of His Majesty's counsel, was called to the degree of Serjeant at Law, and appointed to succeed Mr. Justice *Chambre* in the Court of Common Pleas. He was soon after knighted. His rings bore the motto, '*Qui leges juraque servat.*'

Mr. Justice *Heath* died during the same vacation.

In the present Term, *Charles Abbott*, of the Inner Temple, Esq. having been called to the degree of Serjeant at Law, took his seat on the Bench as one of His Majesty's Justices of the Court of Common Pleas, vacant by the death of Mr. Justice *Heath*. The motto on his rings, was '*Labore.*'

In this Term, also, died Mr. Justice *Dampier*, one of His Majesty's Judges of the Court of King's Bench.

HILARY

HILARY VACATION.

George Sowley Holroyd, Esq. was called to the degree of Serjeant at Law, and gave rings, with the motto, '*Componere legibus orbem.*'

The following barristers were appointed of His Majesty's Counsel learned in the Law;—*James Burrough*, of the Inner Temple; *Charles Warren*, and *Jonathan Raine*, of Lincoln's-Inn; *James Scarlett*, and *George Harrison*, of the Inner Temple; *James Trower*, *William Cook*, *Samuel Yate Benyon*, and *William Agar*, of Lincoln's-Inn; and *John Bell*, of Gray's-Inn, Esquires: and *Charles Wetherell*, of Lincoln's-Inn, Esq. received a patent of precedence.

Died, Sir *Simon Le Blanc*, Knight, one of His Majesty's Justices of the Court of King's Bench.

John Vaughan, Esquire, Serjeant at Law, Solicitor General to the Queen, was appointed one of His Majesty's Serjeants at Law, and promoted to the office of Attorney General to her Majesty, vacant by the death of *George Hardinge, Esq.* one of His Majesty's counsel, and chief justice of the Brecon circuit.

EASTER

EASTER TERM,—56 GEO. III.

Mr. Justice *Abbott* resigned his office of one of His Majesty's Justices of the Court of Common Pleas, having accepted the appointment of one of the Judges of the Court of King's Bench, vacated by the death of Sir *Simon Le Blanc*. He took his seat on the Bench this Term, and soon afterwards received the honour of knighthood.

James Burrough, Esq. one of His Majesty's counsel, took the degree of the Coif. His rings bore the motto, '*Legibus emendes.*' He was afterwards appointed one of His Majesty's Justices of the Court of Common Pleas, in the room of Mr. Justice *Abbott*.



AN

INDEX

TO THE

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A.

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1. OF suit in equity, for the purpose of making an allegation in the affidavit to found an extent in aid, "that the debt has not been sued for in any other Court, other than by such suit which has been so abandoned," is not sufficient to entitle the deponent to a fiat.
Ex parte Hippeley - - - Page 379

ACT OF PARLIAMENT.

1. An Act of Parliament made to correct an error by omission in a former statute of the same session, has relation back to the time when the first Act was passed.
Attorney General v. Pougett - - 381
2. *Vide* CONSTRUCTION OF STATUTES, *passim*.

AFFIDAVIT.

1. The affidavit to found an extent in aid, should state some act from whence the fact of the defendant's insolvency may be inferred, *semble*.
Re v. Rippon - - - - - 398
2. Deponents need not be *severally named* in the jurat as having been sworn (as required in the King's Bench;) but it is sufficient if it express to have been sworn by *all* the deponents.
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3. The Court will not make an order on a defendant, who has answered,—in whose hands another of the defendants, who has not answered, has deposited boxes, in which certain specific articles, claimed by the plaintiff, are said to be believed to

to be—that he shall be restrained from parting with the subject-matter of such deposit, unless the bill be supported by a positive affidavit that the contents of the boxes are actually in danger, *however strong the inference may be, from the facts stated in the affidavit*, that there exists ground for apprehension that it is intended to make an improper use of them to the injury of the plaintiff.

Nor will they make an order on such depository, requiring that he shall produce such boxes, to be left in the hands of his clerk in Court for the plaintiff's inspection, in aid of a trial at law wherein the question of property is in dispute, without a *positive* statement in the affidavit that the object of search is, or was, contained in the boxes.

But although the bill do not contain the above requisite positive statements, held to be necessary on such motions, the Court will permit an affidavit to be read in support of the bill, on the ground that such affidavit may supply such omission in the bill, which if it did it appears would be sufficient.

Attorney General v. Elliott - - 48

4. The affidavit of the solicitor for a defendant will be received in support of a motion for a Commission to examine witnesses residing abroad; and it will be sufficient if he swear that he is informed of, and believes the statements in the bill, if he also add, *that his belief is founded on documents in his possession*, and that, from the nature of the defence involving the question of what coun-

try the ship belongs to, he considers the Commission necessary.

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5. *Vide* INTEREST, N° 3.—NEW TRIAL, N° 2.—SETTING ASIDE PROCEEDINGS.—VARIANCE.

AGISTMENT.

Vide TITHES.

AGREEMENT

(*Withdrawing from.*)

1. One of several persons who have subscribed an agreement, *inter se*, to promote a joint undertaking or common purpose, cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest of the subscribers. And if an Act of Parliament have been passed for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the Act, by having, during the progress of the bill, renounced, before the Committee, all further connection with the undertaking, and desired that his name might be, in consequence, omitted in the Act; nor can the circumstance of his name so being omitted, have the effect of disengaging him.

Kidwelly Canal Company v. Raby -

2. *Vide* REFORMATION OF DEEDS.

AMOVEAS MANUS.

Vide EXTENT, *passim*.

ANSWER

(To amended Bill.)

The time allowed to put in such answer is eight days, but a defendant may, within that period, apply for further time.

On a special application, however, the Court will permit an answer to be filed to an amended bill, even after the plaintiff has replied and called on the defendant to join in commission, on an undertaking to do both immediately.

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APPEARANCE.

Vide NOTICE, N° 2.

APPROPRIATION

(Of Funds in Court.)

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ARREST

(Of Judgment.)

Vide NEW TRIAL, N° 2.

ASSIGNMENT

(Of Term to attend, &c.)

1. *D.* by articles, in consideration of his intended marriage, bearing date
VOL. II.

in 1796, cov nants to settle certain lands, to be purchased with a certain sum of money, to uses (in strict settlement.) In 1808 he enters into bonds to the Crown. In 1812 he purchases lands (generally) in fee, and a mortgage term is assigned to a trustee to attend the inheritance, and the estate is then settled to the uses declared by the said articles, under which *D.* himself takes only a life-interest. *Held*, that the term does not protect the inheritance of the fee against the Crown's debt due from *B.* on the bond, the settlement being voluntary, and the estate not being specifically bound by the deed of 1796.

Re v. St. John - - - - - 317

(Of Bail Bond.)

2. *Vide* STAYING PROCEEDINGS.

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B.

BAIL.

1. If, pending proceedings against bail, a writ of error be allowed, the bail, on application to the Court, will be given the same time to surrender the principal, after judgment affirmed or writ of error non-prossed, as they would have had at the time the writ of error was allowed;
N N

lowed; and in the mean time the proceedings against the bail will be stayed.

And that application will be granted, where the writ of error was allowed two days after the return of the *subp. ad resp.* against the bail, and the motion not made till five days after (the 4th day being Sunday.)

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2. Justification of bail in open Court, to be taken at the sitting of the Court, before other business.

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3. A person occupying a house for a limited period, for which he pays neither rent nor taxes, admissible to justify as special bail.

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N° 1.—VARIANCE.

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Vide PLEADING IN EQUITY.

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Coasting vessels not within the 52 Geo. III. c. 39, or compellable to take a pilot on board, on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and the exemption in the Act is not confined to coasters using the navigation of the river Thames alone.

Usher (qui tam) v. Lyon - - 118

COMMISSION

(*To examine Witnesses abroad.*)

1. Where a vessel has been seized by the officers of the customs, on charges of offences against other Acts of Parliament than that usually called the Navigation Act, if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the Court will, on motion, (a bill having been filed against the Attorney General for that purpose,) grant the defendant a Commission to examine persons residing abroad, and make it part of the order that their depositions shall be received in evidence on the trial.

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2. *Vide* MOTION, N° 1.—AFFIDAVIT, N° 5.

CONSTRUCTION

(*Of Statutes.*)

1. An Act passed to correct an error in a former statute of the same session,

session, has relation back to the time when the first Act passed, and may be read as if it were a part of and incorporated in it.

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2. Bond for securing money already advanced, and to be in future advanced, in account current, (although the obligation be under a penalty in a sum certain, however less than 20,000 l.) cannot be received in evidence, unless it bear a 20 l. stamp: being held, notwithstanding the penalty, to be a bond for the security money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, is uncertain and without limit, in the words of the 48 Geo. III. c. 149. Those words are to be construed as applying to the effect of the condition of the bond, without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security, where such bond is given to secure the payment of a final balance on account current.

Scott v. Allsopp - - - - - 20

3. *Vide* AGREEMENT.—EXTENT, N^o 7.—LIMITATIONS.

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Vide SERVICE OF PROCESS, N^o 1.—SHERIFF, N^o 2.

COSTS.

1. A defendant having moved for costs, for not proceeding to trial according

to notice, may afterwards, and in the same term, move for judgment, as in case of a nonsuit, in this Court: but the Court, on a satisfactory affidavit, will discharge the latter rule, on the terms of the plaintiff giving a peremptory undertaking, and paying the costs.

Fisher v. Hodgkinson - - - - 99

2. *Seemle*, the Court will not give a vicar costs, where, by his bill, he seeks tithes generally, and recovers only in part.

Byam v. Booth - - - - - 231

3. Where there are several issues directed to try the validity of moduses, some of which are found for the plaintiff and others for the defendant, the parties will each be allowed costs on the issues found for him, and must pay them to his opponent where the issues are found against him.

Prevost v. Bennett - - - - - 272

4. Where there are conflicting cases cited, and there is a difference of opinion in the Court, they will not give costs.

Bracebridge v. Buckley - - - 230

5. The question of apportionment of costs between plaintiff and defendant, on the several issues in trespass, *quare clausum fregit*—of not guilty—right of way by prescription—right of way by grant—and on new assignment *extra viam*, on other occasions, and for other purposes—the first and third issue, and the new assignment, (as to very slight trespass only) having been found for the plaintiff; and the second issue, and the other questions on the new assignment, for the defendant; after

N N 2

being

being brought fully before the Court, who took time to consider, it was decided, after some doubt, that the defendant was only entitled to the disallowance to the plaintiff of the costs of the issues found for him (the defendant,) and was not entitled beyond that to have the costs of those issues deducted from the costs allowed to the plaintiff, (which latter was the object of the motion;) and that although the plaintiff had traversed the defendant's plea of the right of way: the Court considering itself bound by the long established practice of the Court of King's Bench in such cases.

Hopkins v. Barnes - - - - 136

COVENANT.

Vide RELIEF IN EQUITY.—REFORMATION OF DEEDS.

CUSTODY.

(*Of Documents.*)

(What to be deemed proper, so as to make them evidence.)

Vide EVIDENCE, N° 9.

CUSTOMS.

Vide EXPORTATION.

D.

DECLARATION.

1. It is the practice of this Court to file the original draft of declaration, and deliver copies to each party on stamp.

Smith v. Bulkeley - - - - 114

2. *Vide* IMPARLANCE.—SERVICE OF PROCESS, N° 5.

DEED.

Vide REFORMATION OF.

DEMURRER.

Vide INJUNCTION, N° 2.

DEPOSITARY.

Vide AFFIDAVIT, N° 3.

DEPOSITIONS.

Vide EVIDENCE, N° 7.

DIEM CLAUSIT EXTREMUM.

Vide EXTENT, N° 2.

DISTRINGAS.

Vide SERVICE OF PROCESS, N° 2.

DOCUMENT,

(*Ancient.*)

Vide CUSTODY OF.—EVIDENCE,
N° 8, 9.

DUTIES.

Vide EXPORTATION.—EXTENT, N° 1.
5. 14.—STAMPS.

E.

EJECTMENT.

Vide SERVICE OF PROCESS, N° 5.

ENDOWMENT.

1. Endowment produced, showing the vicarage expressly endowed of hay, not sufficient, without usage, to support a bill against evidence of an immemorial money-payment to the rector in lieu of corn and hay.
Manby v. Curtis - - - - - 284
2. A particular and minute enumeration of the several articles of endowment in the instrument, does not preclude the vicar's right to other small tithes, not mentioned therein.
Ib.
3. *Vide* EVIDENCE, N° 6. 8.

EQUITY.

Vide INJUNCTION.—ISSUE.

EVIDENCE.

1. An old receipt of a former rector, in the hands of a defendant, for a money-payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, admissible evidence to support a modus.
Bertie v. Beaumont - - - - - 307
2. A valuation of tithes, made by a surveyor at the instance of the rector, with reference to certain money-payments reputed to have been always made in lieu of such tithes, not evidence to fix the rector with an acknowledgment of such money-payments, unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments.
Ib. - - - - - 310
3. A grant of the tithes of land will not be presumed from long non-payment, although the lands be shown to have been once in the possession of a former lay-impropriator, unless some evidence of the existence of a grant be offered, or enjoyment of the tithes be shown by at least something like actual permanency, or a dealing with the tithes as owner.
Meade v. Norbury - - - - - 338
4. A church being void and delapidated, is no ground of discharge from the payment of small tithes to the impropriate rector, as being
N N 3 evidence

evidence of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with in consideration of an abandonment of the small tithes.

Ib.

5. Evidence of retainer only is not sufficiently strengthened to support a presumption of a grant of tithes, by its being shown that a former impropiator had declared the lands in question to be exempt from the payment of tithes, or by instances of exception of the tithes in leases, by the impropriate rector.

Ib.

6. The ecclesiastical surveys are admissible to prove an ancient endowment, and, aided by perception of small tithes, (though not of *all*), will give a vicar a right to tithes of articles of modern introduction against the lessee of the rector.

Cunliffe v. Taylor - - - - - 329

7. Depositions in an old cause admitted, although neither bill, answer, or decree could be found.

Byam v. Booth - - - - - 234

8. Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, (whether perfect or not) are good evidence (*quantum valeant*) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cog-

nizance of the matters to which it relates.—*Wood, Baron, dissentiente. Bullen v. Michell* - - - - - 399

9. Such a book held to have been found in the proper custody to make it evidence, where it is in the possession of an owner who is so far connected with the abbey as to be possessed of some part of the former estates of the monastery; although no part of such estate be situated in the parish in which the question between the parties to the suit arises.

Ib.

10. A Court of Equity having directed an issue to be tried at Law, may order that evidence which would not be strictly admissible on other trials, shall be received; or if satisfied that the jury have come to a right conclusion on the whole case, the Court will refuse a new trial, although evidence strictly inadmissible have been received by the judge below, even without such order.

Ib.

11. *Vide GRANT, N° 2.—ISSUE, N° 3.—WITNESSES.—NEW TRIAL, N° 1.*

EXAMINERS

(Of the Court.)

(Extent of their Authority.)

Vide WITNESSES.

EXCISE DUTIES.

1. A brewer, indebted to the Crown, entitled to extent in aid.
Rex, in aid of Horn, v. Rippon - 398

2. *Vide* EXTENT, N° 14.

EXPORTATION.

Unless a vessel has proceeded *out of the limits of the port* with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the same nature: although she has gone through all the formalities of clearing, &c. at the custom-house, and has paid the exportation duties. And all such new imposts as are laid on such goods attach while the vessel is water-borne within any part of the port.

Attorney General v. Pougett - 381

EXTENT.

1. A debt due to the Crown for duties payable in respect of *post-horses, income tax, stage coaches, and assessed taxes*, is not a debt of such a nature as will entitle the Crown's debtor to an extent in aid, against his own debtor.

Nor will a Baron (*semble*) if aware of the nature of such a debt, grant a fiat; or, if by inadvertence he should, the Court will set it aside in a subsequent stage, *quia im-provide emanavit*, without requiring the defendant to plead.

Rex, in aid of Hughes, v. Wilton 368

2. The allegation required to be made in the affidavit to found an extent in aid, "that the debt has not been sued for in any other Court," cannot be dispensed with; nor can the Crown's accountant be permitted to abandon another mode of proceeding, previously elected by him for the recovery of his debt, for the purpose of enabling him to make that allegation.

Ex parte Hipplesley - - - 379

3. The Crown's debtor cannot have a *diem clausit extremum* in aid after the death of his debtor, against the estate, unless the debt have been found in the life-time of the deceased.

Ib.

4. The Court, on motion for an *amoveas manus*, where the sheriff had seized debts due to the bankrupt at the *teste* of the writ, and paid to his assignees under a commission of bankruptcy issued after the writ of extent, and before the taking of the inquisition, intimated that that was not regularly a subject for summary interference, but ought to be put on the record.

Rex v. Glenney - - - 396

5. A brewer, indebted to the Crown for excise duties, entitled to an extent in aid.

Rex v. Rippon - - - 398

6. The rule of Court, of 15th Car. that no debts, without specialty, shall be found by inquisition for debts in aid, unless it be by order on motion in open Court, or unless it be for debts due to the King's farmers, not to be limited to a confined construction of persons answering the description of King's farmers, but is to be considered as extending to all persons becoming

N N 4

accountable

accountable to the Crown for money belonging to the public in their hands.

The rule of the 3d of William III. that *fiats* shall not be granted on a simple contract debt in vacation, unless by order of a Baron, held not to be intended to infringe the authority of the Chancellor of the Exchequer to sign such *fiats*.

Rex v. Mowbray - - - - - 13.

7. The landlord of premises on which goods have been seized under an extent *in aid*, is not entitled, under the 8th Anne, to call on the sheriff to pay twelve months rent, due before the *teste* of the writ.

Rex v. De Caux - - - - - 17

8. Creditors of a defendant in extent *in aid*, have not such an interest in the property as to entitle them to move to set it aside for their benefit, though joined in the application by the defendant.

Rex v. Mares - - - - - 151

9. An extent *in aid* against the body of a defendant, may be issued, although not applied for in open Court.

Ib.

10. A rule obtained to set aside an extent *in aid*, should, in all cases, be served on the Crown officers of the department of the Revenue, to which the prosecutor of the extent is indebted, to give them an opportunity of coming before the Court.

Ib.

11. If a party, proceeding by extent *in aid*, on such a debt due to the Crown as does not authorize that process, be at the same time really

a debtor by bond also, that does not operate to remove the objection.

Ib.

12. An extent will not be set aside for irregularity, unless the person objecting apply before the sale, under a *venditioni exponas* of the effects which have been levied.

Ib.

13. The rule to claim is not, *per se*, notice of the intended sale.

Ib.

14. The surety in a bond to the Crown by a maltster, for securing the payment of duties on malt made by him, is not such a debtor to the Crown as is entitled to prosecute an extent *in aid*; because, by the special condition of such bonds, the duties are not payable till four months after the maltster shall have made entry, according to the 48th Geo. III. ch. 74. § 23.

Rex v. Sly - - - - - 157

15. It is not necessary that the bond on which the inquisition proceeds should be actually produced.

Ib.

16. The process of extent issues of common right.

Ib.

17. The Court will not grant an *amoveas manus*, to remove the King's hands from partnership property seized under an extent, against one of the firm, in the first instance.

The course is, to apply for a reference to the Deputy Remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained

obtained by consent, on giving security.

Rex v. Rock - - - - - 168

18. *Vide* AFFIDAVIT, N° 1.—VENDOR AND PURCHASER.—ASSIGNMENT OF TERM.

F.

FENUM.

(*True construction of.*)

Vide TITHES, N° 3.

FIAT.

Vide EXTENT, N° 1. 6.

FORFEITURE.

(*Of Lease for breach of Covenant.*)

Vide RELIEF IN EQUITY.

G.

GAMING.

Vide INJUNCTION, N° 1.

GARDENS

(*Tithe of.*)

Vide MODUS, N° 9, 10

GRANT.

1. Grant from the Crown (subsequent to endowment) of lands, including in the general words all the tithes, &c. not sufficient to overturn the vicar's right, without proof of perception.

Manby v. Curtis - - - - - 284

2. A grant of the tithes of land will not be presumed from long non-payment, although the lands be shown to have been once in the possession of a former lay-impropriator, unless some evidence of the existence of a grant be offered, or enjoyment of the tithes be shown, by at least something like actual permanency, or a dealing with the tithes as owners.

Meade v. Norbury - - - - - 338

3. Evidence of retainer only is not sufficiently strengthened to support a presumption of a grant of tithes, by its being shown that a former impropriator had declared the lands in question to be exempt from the payment of tithes, or by instances of exception of the tithes in leases, by the impropriate rector.

Ib.

4. *Vide* TITHES.

H.

HAY,

(Tithe of.)

Vide ENDOWMENT, N° 1.—FENUM.—
TITHES, N° 3.

HERBAGIUM.

*(Construction of.)**Vide* TITHES, N° 3.

I.

IMPARLANCE.

On declaration in covenant running to great length, this Court will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea.

Smith v. Bulkelcy - - - - 114

INFORMATION.

1. If there have been any delay in the interval between the first process issuing against a defendant, and the filing of the information against him, and during that interval he has gone abroad on his duty, as well as some of his witnesses, the Court will postpone the trial, on motion.

Attorney General v. Thacker - 116

2. *Vide* VENUE, N° 1.

INJUNCTION.

1. An injunction will not be granted to restrain a defendant from taking out execution on a judgment being suffered by default, on a case made by bill, and answer that the bill of exchange on which the action had been brought, was given in consideration of defendant's delivering up a former bill, which had been endorsed in consideration of a gaming debt.

Graves v. Houlditch - - - - 147

2. It is sufficient for the purpose of obtaining an injunction to restrain a plaintiff at law from proceeding in the action, that the defendant at law state in his bill and affidavit, that an unsettled account subsists between the parties, and that plaintiff would be found indebted to him on such account, in a greater sum than he is proceeding for; nor is such a bill demurrable on the ground that the plaintiff, in equity, stating a balance to have been acknowledged to be in his favour, might have pleaded it, at law, on notice of set-off.

Wattleworth v. Pitcher - - - 46

3. *Vide* VARIANCE.

INSURANCE.

Vide RELIEF IN EQUITY.

INTEREST.

1. The Crown is not entitled to interest on

on the whole sum liquidated by the Deputy Remembrancer's report, made on reference to him, to ascertain what is due to the Crown for principal *and interest* on a forfeited bond, where the funds in Court, out of which it is to be ultimately paid, are the produce of the sale of real estates, seized under an extent at the instance of the Crown.

A debt due to the Crown, although originally merely a simple contract debt, if it have been brought into Court in the shape of the produce of a sale under an extent, held by a majority of the Court to carry interest, from the time when the debt shall have been ascertained by the Deputy Remembrancer's report, notwithstanding there should be no specific appropriation in the report; the money being appropriated by law on the confirmation of the report, and therefore bears interest, as being from that moment the proper money of the Crown.—*Richards, Baron, dissentiente.*

Rex v. Mainwaring - - - - 67

2. It is sufficient, on a motion for interest on affirmance of a judgment, to apprise the Court of the cause of action *ore tenus*, and an affidavit not necessary.

Anon. - - - - - 7

INTERLOCUTORY JUDGMENT.

Vide JUDGMENT.

ISSUE.

(*Out of Courts of Equity.*)

1. Summary of the usual proceedings,

on the direction of issues out of the Court of Exchequer, to be tried at Law, and on the return of the postea.

Askew v. Greenhow - - - - 314

2. A Court of Equity may decide conclusively in the first instance, on all causes brought to a hearing, without directing an issue to be tried, except in the cases of a bill by a heir at law and a rector. The direction of an issue by the Court of Equity is in its discretion, and its object being solely to institute further inquiry, merely for the better information of the Court itself, the order for the trial of an issue is *ex mero motu*.

Bullen v. Michel - - - - - 399

3. So, also, it is equally in the discretion of a Court of Equity to grant or refuse a new trial of an issue directed to be tried at Law; for the issue having been originally directed merely to satisfy the conscience of the Court on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at Law, and it will send the issue down as often as the result is not satisfactory; or, if satisfied that the finding of the Jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called) had been received below.—*Wood, Baron, dissentiente.*

Bullen v. Michel - - - - - 399

4. *Vide* TITHES, N^o 2. 4.—MODUS, N^o 10.

JUDGMENT.

1. Interlocutory judgment may be signed on the last day of the time given

given by the rule to plead, if no plea then filed.

Edmonds v. Leman - - - - 6

(*As in case of Nonsuit.*)

2. *Vide* COSTS, N° 1.—VENUE, N° 2.

L.

LANDLORD AND TENANT.

Vide EXTENT, N° 7.—RELIEF IN EQUITY.

LAPSE

(*Of Legacy.*)

A bequest by the obligee to one of joint obligors, of a debt due on the bond, in these terms; "I remit and forgive to T. W. the sum of 500*l.* which he stands indebted to me on his bond; and I direct said bond to be delivered up to him and cancelled," is merely a personal legacy to T. W., and lapses, by his death in the life-time of the testator: for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, and the representatives of the deceased legatee, are not discharged from the payment of the money due on the bond.

Izon v. Butler - - - - 34

LEGACY.

Vide LAPSE OF.

LESSOR AND LESSEE.

Vide RELIEF IN EQUITY.

LIMITATIONS

(*Statute of.*)

Statute of Limitations (32 Hen. VIII. ch. 2.) is not applicable as a bar to a bill in Equity for tithes.

Meade v. Norbury - - - - 366

LORD OF MANOR.

Owner of the soil sufficiently answers the description of Lord of the Manor to take an allotment under an Inclosure Act, although the manor be, to other purposes, extinct.

Smith v. Smith - - - - 101

M.

MALT DUTIES.

Vide EXTENT, N° 13. 14.

MEMORANDA, page 505.

MISNOMER.

A *subp. ad. resp.* and attachment for want of appearance, in both of which there is a mistake in the defendant's surname, not sufficient ground for a rule to show cause why the proceedings should not be set aside: although the defendant give the plaintiff notice on being served with process, that he will move the Court to set it aside if proceeded in, and tender the plaintiff his demand.

Shaw v. Tytherleigh - - - - 328

MODUS.

1. A modus may exist for artificial grasses, used in the improvement of hay.

Bertie v. Beaumont - - - - 303

2. Modus of 3*d.* for a lamb not rank.
Ib.

3. Modus of 4*d.* laid to be for every cow, in lieu of the tithe of milk, not supported by proof of a modus for every cow with calf.

Ib.

4. Modus of 1*s.* for every seventh pig on the 9th day, held good after some doubt.

Ib. - - - - - 307

5. If it is not stated in an answer to a bill for tithes which sets up a modus, in respect of what titheable article the modus is laid, it is bad, for uncertainty; and the omission is a substantial defect which no evidence can supply.

But if it can be collected from the whole answer, to what article it refers, it will be sufficient.

Bourke v. Isaac - - - - 299

6. Modus of 1*d.* for each lamb, where the number did not exceed four; 1*s.* where the number did not exceed five; 1*s.* 8*d.* where the number did not exceed six; 1*s.* 9*d.* where the number did not exceed seven; 1*s.* 10*d.* where the number did not exceed eight; 1*s.* 11*d.* where the number did not exceed nine; and 2*s.* where the number did not exceed ten; held not rank, and sent to an issue.

Askew v. Greenhow - - - - 314

7. A modus pleaded, of a sum of money anciently and uniformly paid for tithes within a certain part of a parish, held good; although it far exceed the sum which such part should have paid if it had contributed its due proportion, with reference to the rest of the parish, measuring the share of such part according to its extent with respect to the whole parish; and although some witnesses show it to have been broken in upon, and one, that he remembered (as appeared from depositions in an old cause) the origin of the payment.

Byam v. Booth - - - - - 231

8. Modus of 3*d.* a year for every cow, and 6*d.* for every calf, in lieu of the tithe of cows, calves, and milk, is good.

Prevost v. Bennett - - - - - 272

9. Modus of a penny a year in lieu of the tithe of gardens is good, and may be so pleaded, without laying it to be payable for ancient gardens.

Ib.

10. Where

10. Where an issue is granted to try such a *modus* so laid, (for gardens generally,) the Court will order that the jury be directed to say whether they find the *modus* to have been paid for gardens generally, or for ancient gardens, and the judge to endorse the *postea* accordingly.

Prevost v. Benett - - - - 272

MORTUARIES.

Not recoverable in a Court of Equity.

—*Quere*, if at law.

Manby v. Curtis - - - - 284

MOTION.

1. A defendant, in an information for breach of the Navigation Laws, is not entitled to a commission to examine witnesses abroad, *on motion* made to *this* Court under the 13th and 14th Ch. II, pending the progress of the proceedings under the information.

Attorney General v. Laragoity - 166

2. Such an application cannot be blended with another, 'that the vessel may be restored on giving security to redeliver her, on a verdict being found against the applicant in the same motion.'

Ib. - - - - - 168

3. *Vide* EXTENT, N° 4.—INTEREST, N° 2.—BAIL, N° 1.—COSTS, N° 1.

N.

NAVIGATION LAWS.

Vide COMMISSION, N° 1.—EXPORTATION.

NEW TRIAL.

1. If the Jury find that words directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict be recorded for the defendant, the Court will not grant a new trial on the ground that it was a verdict against evidence, although it had been proved on the trial that they were spoken in anger, and it appeared that the plaintiff had had the misfortune to have been the occasion of his brother's death by an unlucky accident.

Wilson v. Stephens - - - - 282

2. The Court will not, after verdict, arrest a judgment, on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial.

Nor does it seem that a conviction would be sufficient ground for sending the cause to a jury for re-investigation.

Attorney General v. Woodhead - 3

3. *Vide* ISSUE, N° 3.

NON-DECIMANDO.

Vide GRANT.

NONSUIT.

1. A plaintiff (*qui tam*) in an action on the statute for not receiving a licensed pilot demanding to be taken on board and put in conduct of the vessel, not proving production of his license

license by the pilot, at the time of such demand, will be nonsuited: although it was in evidence that the pilot had it in his personal custody at that time, and that the master did not require the production of it.
Usher (qui tam) v. Lyon - - 118

2. *Vide* CONSTRUCTION of STATUTES,
 N° 2.—STAMP DUTIES.—VENUE.

NOTICE.

(Of Trial.)

1. The words in the 14 Geo. II. requiring ten days notice of trial to be served on a defendant for the sittings at London or Westminster, where he resides above forty miles from the said cities of London or Westminster, held to apply to his permanent, not temporary residence.
Raine v. Hodgson - - - 279

(Of Appearance to Mesne Process.)

2. If the day on which a defendant is called on to appear, be omitted in the notice attached to mesne process, the Court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has suffered a whole term to elapse without giving notice to the plaintiff, and does not apply to the Court till after the execution of a writ of inquiry.

Wickham v. Mealing - - - 9

(Of Action under Statute.)

3. A separate notice to each of several

persons intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an Act of Parliament, which provides that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants, of such intended action; although none of the other persons, who are afterwards joined in the action, are named in the notice to either of them.

In such an action, a deviation from the line described by the Act of Parliament as the course of an intended canal, does not deprive the defendants (as trespassers) of their right to notice before action brought, on the ground that what has been done by them was not done in pursuance of the Act.

Agar v. Morgan - - - 126

(Of Sale under Extent.)

4. The rule to claim under an extent is not, *per se*, notice of an intended sale under the *Venditioni exponas*.

Rex v. Mares - - - 151

O.

OWNER OF SOIL.

When and wherefore to be considered as Lord of Manor.

Smith v. Smith - - - 101

P.

PARTNERSHIP.

(Effects.)

Vide EXTENT, N° 17.

PAYING MONEY INTO
COURT.

The Court will not order a plaintiff who has obtained an injunction to stay proceedings at law, on a bill filed for a discovery, by which he seeks to establish a case of the goods being charged at a much greater price than the one agreed on,—to pay even the price *acknowledged* to be just, into Court, to abide the result of the action.

Parnell v. Nesbitt - - - - 149

PERCEPTION

(Of Tithes.)

Vide EVIDENCE.—MODUS.—TITHES.

PERJURY.

Vide NEW TRIAL, N° 2.

PILOTS.

Vide CONSTRUCTION OF STATUTES.—
NONSUIT.

PLEADING

(At Law.)

Vide NONSUIT.

PLEADING

(In Equity.)

1. In pleading a modus, the titheable article intended to be covered by it must be expressed, or be clearly to be collected from the whole answer, without having recourse to external evidence.

Bourke v. Isaac - - - - 299

2. The Court will not dismiss the bill of a vicar who claims by it tithes throughout a whole parish, and only proves his claim in part of it, on that ground; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial. — Wood, B. *dissentiente*.

Ib.

3. Vide INJUNCTION, N° 2.—MODUS, N° 3, 4, 5, 6, 7, 8, & 9.

POSTEA.

Vide ISSUE, N° 3.—MODUS, N° 10

POTATOES.

(Tithes of, to whom due.)

Vide TITHES, N° 1.

POUNDAGE.

Vide SHERIFF.

PRACTICE.

1. The Court will not, generally, grant a rule to show cause on the last day of Term, where it would operate to stay proceedings.

Anon. - - - - - 143

2. *Sed. Vid.* An exception in same page.

3. *Vide* AFFIDAVIT.—SERVICE OF PROCESS.—NEW TRIAL.—NOTICE.

PRESUMPTION

(*Of Grant.*)

Vide GRANT.—EVIDENCE.

R.

RANKNESS.

Vide MODUS, *passim*.

RE-ARGUMENT.

The Court will not appoint a re-argument after a decision, in the absence of the Crown officer, to give him an opportunity of being heard.

Rex v. Boyle - - - - - 5

RECEIPT.

Vide EVIDENCE, N° 1.

VOL. II.

RECTOR.

Vide EVIDENCE.—ISSUE.—TITHES.

REFORMATION

(*Of Deeds by Courts of Equity.*)

The Court will reform a deed, entered into under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant complained of as not being the intention of the covenantor at the time of the agreement, or inserted therein, will be directed to be omitted, although such covenant has been introduced by the attorney of the covenantor, if without his express authority, on its being shown that the party had not considered himself liable to such covenant by the terms of the agreement.

Rob v. Butterwick - - - - - 190

RELEASE

(*Of Debt.*)

Vide LAPSE OF LEGACY.

RELIEF IN EQUITY

(*Against Breach of Covenant.*)

1. Courts of Equity will not relieve against a forfeiture for breach of a covenant to insure, &c.

Rolfe v. Harris, and Reynolds v.

Pitt - - - - - 206, 212

O o 2. The

2. The Court will not give relief in equity against a lessor's right of re-entry, for a forfeiture by breach of a covenant to lay out a sum of money on the premises in repairs within a given time.

And that notwithstanding there have been no requisition made by the landlord, for performance of the covenant, and although he have suffered the tenant to continue in possession of the premises for three years after the breach of covenant, but has not received rent from him in the mean time, or otherwise recognized the subsistence of the tenancy.

Bracebridge v. Buckley - - - 200

3. Nor is it enough to show that no damage has been sustained by the delay, and that the premises may be put into as good or better condition than they would have been if the covenant had been punctually performed, or even that, by a mistake of the solicitor who prepared the lease, the limitation of the period for performance of the covenant had been introduced, although not warranted by the previous agreement, or so understood at that time by the parties themselves, if that be denied by the answer.

Ib.

4. The ground on which the Court refuse to relieve in such a case, is, that they have no effectual means of ascertaining, or of making compensation to the covenantee.

The time within which the covenant was to have been performed having been limited by the lease, is equivalent to a specific requisition of performance by the lessor; and a neglect on the part of the tenant, is tantamount to a refusal in Law.

Ib.

REGULA

(*Generalis.*)

As to justification of bail - - 327

RENDER

(*By Bail.*)

Vide BAIL.

RENT.

Vide EXTENT, N° 7.

REPORT.

(*Deputy Remembrancer's.*)

Vide INTEREST, N° 1.

REPUTATION.

(*How far Evidence.*)

Vide EVIDENCE, passim.—GRANT.

RESTORATION

(*Of Vessels seized by Revenue Officers.*)

The Court will not grant an order to restore a vessel seized on charges of offences against the Navigation Laws,

Laws, where a question of identity may be raised on the trial of the cause; although the defendant offer approved security for re-delivering her if a verdict should be recovered against him.

Attorney General v. Laragoity - 172

RETAINER

(*Of Tithes.*)

1. No proof of right thereto as perception is.

Vide EVIDENCE.

REVENUE.

WIDE COMMISSION.—RESTORATION OF VESSELS.—EXPORTATION.—DUTIES.

RULE

(*To plead.*)

Vide JUDGMENT.

RULES

(*Of Court.*)

Vide EXTENT, N° 5.—REGULA GENERALIS.

S.

SERVICE

(*Of Process.*)

1. Service of all processes intended to bring a party into contempt, should be personal if possible: but if it can be made appear to the Court that service cannot be effected personally, and that there was probable cause to suspect that the party kept out of the way for the purpose of avoiding such personal service, the Court will grant a rule nisi for an attachment, and order that service, by leaving the rule at the dwelling-house, shall be sufficient.

Weston v. Faulkner - - - - 2

2. Service of *venire facias ad resp.* by leaving it with a clerk of the defendants at their counting-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service.

M^cNabb v. Ingham - - - - 9

3. Service of an order of Court on a servant of the party, not at his dwelling-house, insufficient.

Anon. - - - - 4

4. Service of *venire facias* at dwelling-house, on defendant's wife, good.

Hall v. Franklin - - - - 4

5. After several ineffectual attempts made to serve a tenant in possession with declaration in ejectment, on occasion of the last of which his servant admits that he is in the house, but refuses to permit the per-

O o 2

son

son applying to see him, if the declaration be then delivered to the servant, the Court will make an order that such service shall be sufficient.

Doe, dem. Harvey, v. Roe - - - 112

6. Service of *venire* on defendant's servant, at his dwelling-house, during his absence abroad, not sufficient, nor will the Court grant a rule to show cause why such service should not be held sufficient.

Caulin v. Lawley, Baronet - - - 12

7. The Court will order the solicitor of a plaintiff residing abroad, who has been employed to commence an action at law, to accept a subpoena on an injunction bill, supported by an affidavit of the facts, and of the subsistence of an account between the parties.

Wattleworth v. Pitcher - - - 5

8. Where an order for a messenger has been issued against a sheriff for contempt, in not returning an attachment against a defendant for not putting in his answer, the previous order to the high sheriff to return the process, may be served on his under-sheriff, and such service will be good.

Ivatt and others v. Ward - - - 81

9. A rule obtained to set aside an extent in aid, should, in all cases, be served on the Crown officers of the department of the Revenue, to which the prosecutor of the extent is indebted, to give them an opportunity of coming before the Court.

Rex v. Mares - - - - - 151

SETTING ASIDE PROCEEDINGS.

1. On motion to set aside proceedings as *infra dignitatem*, on an affidavit

that the demand sued for does not amount to 40s. the Court will not inquire into the amount, if an affidavit be put in on showing cause, that the demand exceeded that sum, but will at once discharge the rule, with costs.

Branker v. Massey - - - - - 8

2. *Vide* EXTENT, N^o 1. 7. 11.

SHERIFF.

(Poundage.)

1. If,—on an extent issuing against the acceptors of bills of exchange (drawn in favour of officers of the Crown, for public money received by the drawers, and remitted by them to the acceptor) for the purpose of levying the Crown's debt,—the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay the Sheriff's poundage on the levy. And the Sheriff, having retained, under an order of the Court, a sum for poundage in his hands, will be ordered to restore it to the assignees of the bankrupt acceptor's estate.

Semble. Whatever be due to the Sheriff for poundage, in such a case, should be paid by the Crown.

Rex v. Fremc - - - - - 58

(Contempt by.)

2. Where an order for a messenger has been issued against a Sheriff for contempt, in not returning an attachment against a defendant for not putting in his answer (other attachments having been issued before,) it

it is peremptory: and the Court will not stay the order, although it go to affect a Sheriff not in office at the time of the alleged original neglect: nor will they consent to enlarge the time allowed by the order.

Thomas v. Matthias - - - 32

3. The previous order to the High Sheriff, to return the process, may be served on his under-sheriff, and such service will be good.

Nor will the Court enlarge the time limited by the order in such a case.

Ib.

SLANDER.

Vide NEW TRIAL, N^o 1.

SOLICITOR.

Vide SERVICE OF PROCESS, N^o 7.—
AFFIDAVIT, N^o 5.

STAMP DUTIES.

A bond given to secure money already advanced, and to be advanced in future on account current, cannot be received in evidence, unless it have a 20*l.* stamp, although the penalty be in a much less sum than 20,000*l.*

Scott v. Allsopp - - - 20

STATUTES

(Public.)

Henry VIII.

27. & 31. (Tithes.) - - - 356

32. ct 2. sec. 7. (Limitations.) - 356

Charles II.

13, 14. c. 11. (Navigation Act.) 166

Philip & Mary.

2. (Tithes.) - - - 356

Anne.

8. c. 14. sec. 1. Payment of a year's rent to landlord before removal of goods taken in execution - 18

George II.

14. c. 17. (Notice of Trial.) - 279

29. c. 2. (Navigation Laws.) - 166

George III.

17. c. 41. sec. 1. (Clandestinely unshipping homeward-bound goods.) 117

19. c. 50. (Distillers.) - - - 3

21. c. 55. (Distillers.) - - - 3

24. c. 47. (Navigation Laws.) - 166

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47. c. 66. (Navigation Laws.) - 166

48. c. 74. (Malt Duties.) - - 159

48. c. 149. (Stamp Duties.) - - 21

48. c. 60. (Tanner exercising trade

of leather cutter.) - - - 113

52. c. 39. (Pilot Act.) - - - 118

53. c. 33. (Exportation Duties.) - 384

STATUTES.

(Private.)

Kidwelly Canal Act - - - -	93
Inclosure Act - - - - -	101
Hull Pilot Act - - - - -	119
Regent's Canal Act - - - -	126

STAYING PROCEEDINGS.

1. May be done on last day of Term, where had on assignment of bail bond.

M'Phedron v. Fotherington - - 143

2. *Vide PRACTICE.*

SUBPENA.

1. *Vide SERVICE OF PROCESS, N° 1. & 7.*

2. *Quere*, Whether a subpoena lie, to bring witnesses to London to be examined by an examiner of the Court.

Ivatt v. Ward - - - - - 81

SUGGESTION.

(On the Record under Court of Conscience Act.)

If the plaintiff recover less than 5*l.* in an action brought in London, where the original debt has been reduced by payments, and not by

set-off, the defendant will be permitted, on motion, to enter a suggestion on the roll, under the London Court of Conscience Act, in order to have his costs allowed.

Cook v. Johnson - - - - - 19

SUPERSEDEAS.

Vide BAIL, N° 1.

T.

TAXES.

Vide EXTENT, N° 1.

TITHES.

(Of Articles of modern Introduction.)

1. The lessee of a rector, in whose lease there is an exception of various small tithes *nominatim*, and of all the tithes belonging to the vicar, is not entitled to tithe of potatoes, although he has always received some of the small tithes in kind, not mentioned in the lease, *speciatim*, either as demised or excepted, and particularly for geese and pigs: his general right being abridged by the operation of the particular exceptions in the lease, which was held to carry the tithes of articles of modern introduction to the vicar; for that it was not to be

be inferred, from the lessee of the rector having received certain articles of small tithes, that he is entitled to take tithe of potatoes, although the vicar was not entitled to *all* the small tithes, nor had enjoyed the tithe in dispute.

Cunliffe v. Taylor - - - - - 329

2. Where an exemption from payment of tithes, is claimed for a grange formerly belonging to a privileged order, (*quamdiu manibus propriis*,) the Court will direct an issue to try the exemption, and also to ascertain the extent of such grange, if doubtful, from the depositions in the cause.

Byam v. Booth - - - - - 231

3. A vicar founding his claim to agistment tithe by showing that he alone has taken the other small tithes, held to have made out his title to that tithe, although never till of late received or demanded by him or his predecessors, and although in ancient times the Crown had conveyed by grant to lay impropriators, tithe not only of grain and hay, but of herbage ("*decimas feni et herbagii*.") Herbage does not, *ex vi termini*, necessarily mean or cover tithe of agistment, unless perception be proved.—*Wood, B. dissente*nte.

Ib.

4. The Court will not dismiss the bill of a vicar who claims by it tithes throughout a whole parish, and only proves his claim in part of it, on that ground; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial.—*Wood B. dissente*nte.

Ib.

5. A vicar, proving perception of small tithes, (where the Crown, and those claiming under it, have never received or dealt with other tithes than those of corn and grain,) held entitled to demand tithes of agistment, turnips and potatoes; although such tithes have never before been received by his predecessors; and that, although the documentary evidence adduced in support of the vicar's claim refer to "small tithes," and not "*all* small tithes;" and although it appear that a pension or portion is payable out of the vicarage to the superior.

Semble, there must be an *express* grant of such small tithes to the impropriator, or an *express* exemption of them out of the vicarage, or an actual perception of them by other persons proved, to take away the vicar's right.

Kennicott v. Watson, and others - 250

TITLE.

(*As Lord of Manor, to Allotment under Inclosure Act.*)

1. To make title to an allotment under an Inclosure Act, of a sixteenth, to be set out for the person claiming to be Lord of a certain manor, it is sufficient, on the trial of an issue under the Act, to show that he is owner of the soil. It need not be proved that there is such a manor existing in law, or that the claimant is Lord, properly so called.

Smith v. Smith - - - - - 111

TRIAL

*(Notice of.)**Vide* NOTICE.*(Postponement of.)**Vide* INFORMATION.

U.

USAGE.

*(Of what it is evidence.)**Vide* ENDOWMENT.—EVIDENCE.—
GRANT.

V.

VARIANCE.

A Variance between the affidavit in support of a motion for an injunction, and the bill, in the date of the bill of exchange on which the defendant had commenced proceedings at Law, is sufficient ground for dissolving an injunction obtained thereon, and the Court will, on motion, dissolve it.

Wattleworth v. Pitcher - - - 189

VENDOR AND PURCHASER.

The Court will not interfere to assist a purchaser for valuable consideration, of an estate seized under an extent against the vendor, for which the purchaser has paid the principal part of the purchase-money, and offers to pay the remainder to the Crown, or to give up the estate on satisfaction made to himself.

Such things are matter of arrangement, and can only be effected by the consent of the Crown.

Re *v. Hollier* - - - - - 394

VENIRE FACIAS.

Vide SERVICE OF PROCESS, N° 2.

VENUE.

1. A defendant, in an information at the suit of the Attorney General, is not entitled to a change of *venue*, without his consent.

Attorney General v. Smith - - 113

2. This Court will order a plaintiff showing cause against a rule for judgment, as in case of a *nonsuit*, for not proceeding to trial according to notice, where the *venue* has been changed to a county where no assizes are held in the spring, to consent that the *venue* shall be brought back to the original county, that the trial may be brought on without further delay.

Ellison v. Coath - - - - - 16

VICAR.

Vide ENDOWMENT. — TITHES. —
COSTS.—EVIDENCE.—ISSUE.

W.

WILL.

Vide LAPSE OF LEGACY.

WITNESSES.

(*Examination of by Examiner, on
Interrogatories.*)

1. The Examiners of this Court have no authority to examine witnesses

at a greater distance from London than *ten miles*, unless by consent: and such consent must be express.

They may examine witnesses brought up to town from any part of the kingdom: *sed quare*, whether a *subpoena* lies, to bring the witnesses to London.

Ivatt v. Ward - - - - - 81

2. *Vide* NEW TRIAL, N° 2.

WRIT OF ERROR.

Vide BAIL, N° 1.

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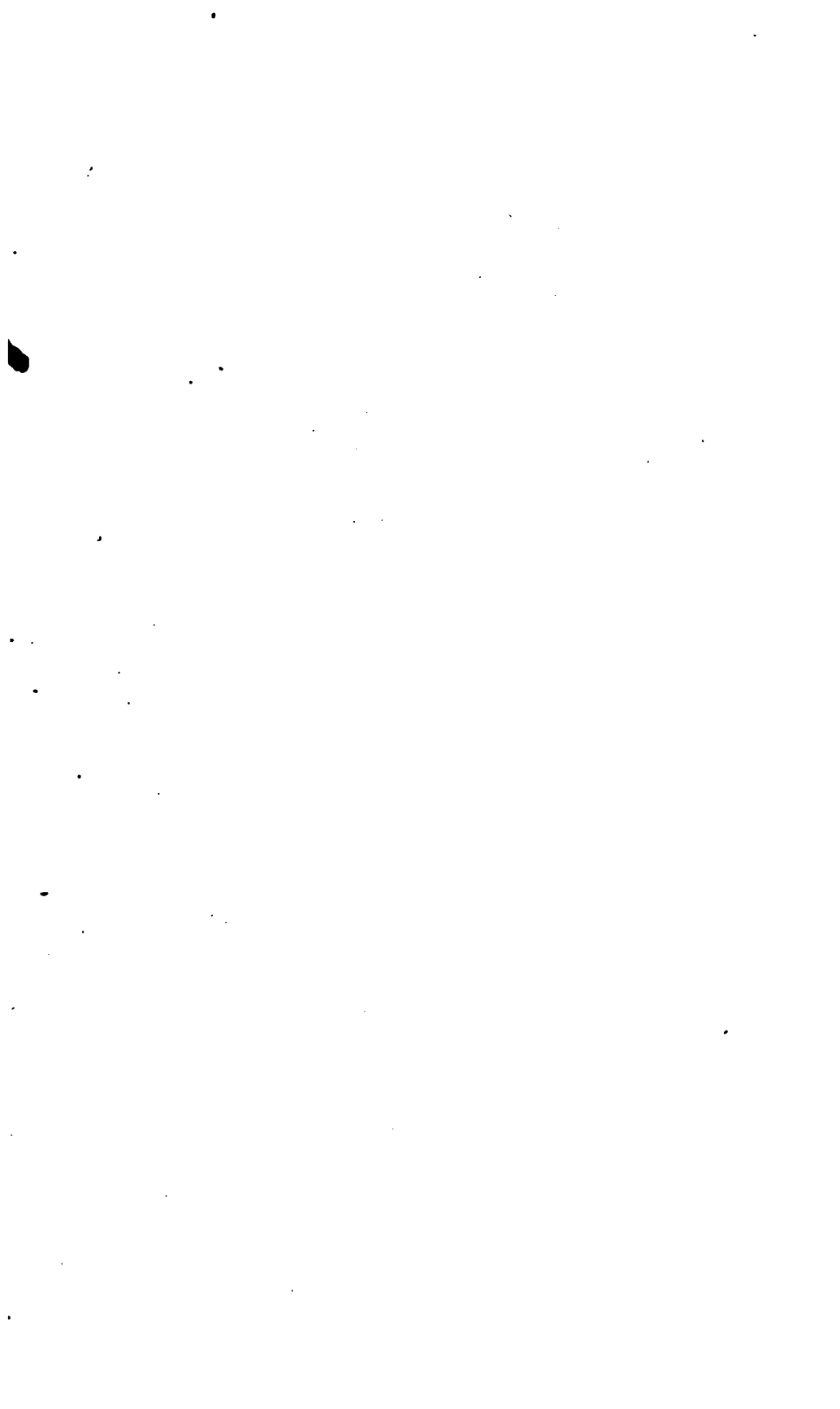
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